Supreme Court, U.S.
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CLERK

No. 89-478

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MARYLAND,

Petitioner,

v.

SANDRA ANN CRAIG,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

JOINT APPENDIX

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

GARY E. BAIR*
Assistant Attorney General

200 Saint Paul Place
Baltimore, Maryland 21202
(301) 576-6422

Counsel for Petitioner

MARIA CRISTINA GUTIERREZ*
WILLIAM H. MURPHY, JR.
GARY S. BERNSTEIN
FREDERICK P. CHARLESTON
GIL A. AMARAL

1007 North Calvert Street
Baltimore, Maryland 21202
(301) 539-6500

Counsel for Respondent

Counsel of Record

PETITION FOR CERTIORARI FILED SEPTEMBER 22, 1989
CERTIORARI GRANTED JANUARY 16, 1990

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The following opinions have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Writ of Certiorari:

Reported Opinion of the Court of Appeals of Maryland, *Sandra Ann Craig v. State of Maryland*, No. 110, September Term, 1988 (filed July 24, 1989) . 1a

Reported Opinion of the Court of Special Appeals of Maryland, *Sandra Ann Craig v. State of Maryland*, No. 1547, September Term, 1987 (filed August 3, 1988) 22a

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

October 16, 1986	Indictment filed in the Circuit Court for Howard County, Maryland.
January 13, 1987	Motion for the Use of Closed Circuit Television by Child Victims filed.
January 16, 1987	Defendant's Opposition to State's Request for Use of Closed Circuit Television filed.
January 20, 1987	Hearing on use of closed circuit television commenced.
January 21, 1987	Hearing on use of closed circuit television concluded; motion for use of closed circuit television granted.
March 2, 1987	Voir dire of prospective jurors commenced.
March 3, 1987	Voir dire of prospective jurors continued.
March 4, 1987	Voir dire of prospective jurors continued and jury selected.
March 16, 1987	Trial commenced; State's case in chief commenced.
March 17, 1987	State's case in chief continued.
March 18, 1987	State's case in chief continued.
March 19, 1987	State's case in chief continued.
March 20, 1987	State's case in chief continued.
March 23, 1987	State's case in chief concluded; defendant's case commenced.
March 24, 1987	Defendant's case continued.
March 26, 1987	Defendant's case continued.

March 27, 1987	Defendant's case continued.
March 30, 1987	Defendant's case concluded; State's rebuttal commenced.
March 31, 1987	State's rebuttal concluded; defendant's surrebuttal commenced and concluded.
April 1, 1987	Jury instructed; jury begins deliberations.
April 2, 1987	Jury returns guilty verdicts for first degree sexual offense, second degree sexual offense, child abuse, unnatural perverted sexual practice, assault, and battery.
September 21, 1987	Second Amended Motion for New Trial filed; motion denied after hearing; defendant sentenced to 10 years for each of first degree sexual offense, second degree sexual offense, child abuse, and unnatural perverted sexual practice, said sentences to run concurrently; defendant's notice of appeal filed.
August 3, 1988	Opinion and judgment of the Court of Special Appeals of Maryland.
October 14, 1988	Defendant's petition for writ of certiorari filed.
December 21, 1988	Order of Court of Appeals of Maryland granting petition for writ of certiorari.
July 24, 1989	Opinion and judgment of the Court of Appeals of Maryland.

IN THE
CIRCUIT COURT
FOR HOWARD COUNTY

Criminal Nos.: 15468 & 15568
Criminal Nos.: 15458 - 15467,
15569, 15625 & 15737

STATE OF MARYLAND

vs

JAMAL CRAIG
SANDRA CRAIG

FILED JAN 13 1987

MOTION FOR THE USE OF CLOSED CIRCUIT TELEVISION BY CHILD VICTIMS

Now comes the State of Maryland by and through A. Gallatin Warfield, III and Kate O'Donnell, Assistant State's Attorneys, and, pursuant to Maryland Rule 4-252(c), and Section 9-102 Courts and Judicial Proceedings Article, respectfully represents unto this Honorable Court as follows:

1. That the above-referenced cases each involve a "child" victim.

2. That the State intends to offer the testimony of each child victim at each separate trial of the Defendants.

3. That in each case, testimony of the child victim in the courtroom would result in the child suffering serious emotional distress such that the child could not reasonably communicate.

4. That the State hereby requests that the Court permit the testimony of the child victim in each case to be pre-

sented by way of closed circuit television and that the procedures outlined in Section 9-102 Courts and Judicial Proceedings Article be utilized in implementing such a method.

WHEREFORE, the State respectfully prays that the testimony of the child victims in the herein noted cases be conducted by means of closed circuit television.

/s/ A. Gallatin Warfield, III
A. Gallatin Warfield, III
Senior Assistant State's Attorney

/s/ Kate O'Donnell
Kate O'Donnell
Senior Assistant State's Attorney

[Certificate of Service omitted in printing]

IN THE CIRCUIT COURT
FOR HOWARD COUNTY

CASES #'s: 15458-15467
15569, 15625, 15737

STATE OF MARYLAND

vs.

SANDRA CRAIG

FILED JAN 16 1987

DEFENDANT'S OPPOSITION TO STATE'S REQUEST FOR USE OF CLOSED CIRCUIT TELEVISION

Comes now the Defendant, SANDRA CRAIG, by and through her attorney, FRED KOLODNER, Esquire and requests that the State's Request for Use of Closed Circuit Television pursuant to Section 9-102 of the Courts and Judicial Proceedings Article of the Maryland Annotated Code be denied and as reasons therefor states:

1. Before a child may testify by means of closed circuit television, the judge must first determine that testimony by the child will result in the child suffering such serious emotional distress that the child could not reasonably communicate.

2. That there has been no such finding except for the self-serving allegations attributed to the State.

3. That the judge impliedly must find that the child is not competent to testify and is therefore unavailable. The Defendant has *never* been advised by the State that any children (witnesses) are unavailable to testify.

4. That the use of closed circuit television for these proceedings violates the Defendant's right to confrontation

of witnesses. This is a fundamental guarantee as stated in the Sixth Amendment of the Constitution: "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

5. Recollection, communication and truthfulness are enhanced by a face-to-face confrontation. Since the Defendant must remain in the courtroom and not in the presence of the testifying witness pursuant to the above-referenced section, this right of confrontation, although artificially maintained, is lacking.

WHEREFORE, the Defendant, SANDRA CRAIG, prays this Honorable Court as follows:

1. Order that the State's Request for Use of Closed Circuit Television for the children be denied.

2. Order such other and further relief as the nature of the case may entail.

/s/ Fred Kolodner
FRED KOLODNER
Attorney for Sandra Craig
Suite 108, 1055 Taylor Avenue
Towson, Maryland 21204
583-8785

[Certificate of Mailing omitted in printing]

[1-1]

IN THE CIRCUIT COURT
FOR HOWARD COUNTY, MARYLAND

Criminal Cases 15458
through 15467, 15569
15625 and 15737

Criminal Cases 15468 and 15568

STATE OF MARYLAND

Vs.

SANDRA A. CRAIG,

Defendant

And

Jamal D. Craig,

Defendant

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS
(Motion In Limine and Motion To Use Video Tape)
VOLUME I OF II

Howard County, Maryland
Tuesday, January 20, 1987

BEFORE:

HONORABLE RAYMOND J. KANE, JR.

APPEARANCES:
For the State:
A. G. Warfield, Esquire
M. C. O'Donnell, Esquire

For the Defendant:
F. Kolodner, Esquire

Janet Falkenstine-Secretary/Court Reporter
Circuit Court for Howard County
8360 Court Avenue
Ellicott City, Maryland 21043

[1-30]

* * *

MR. WARFIELD: Thank you Your Honor. All right. Your Honor, the second matter involves the use of closed circuit television for the testimony of the child victims in this case. I might also state that—that this would include all the cases and that is obviously in an attempt to resolve this issue in advance of trial. I would ask the Court pursuant to Maryland Rule, or excuse me, Courts and Judicial Proceedings Article Section 9-102 which is a 1985 law which permits this, I submit to the Court, I will proffer or I will submit the testimony of various witnesses at this time for the limited purpose of establishing that the various child victims in this case would in fact be—would not be amenable to coming into court and testifying, that they should in fact be permitted by the Court to testify by way of closed circuit television and I will present the witnesses. I have three today and three for tomorrow, as they relate to each named individual. Some of the witnesses see more than one child so we will get a number of children out of the way with any given witness, but that's what I propose to do and I ask the Court to limit the inquiry to that very narrow issue.

THE COURT: It's understood, gentlemen, that that [1-31] is the narrow issue. All the other issues as we indicated previously, issues like the relevance of this testimony, competency of these particular witnesses are not being addressed. The sole issue is whether or not it is appropriate for the Court to permit these children to testify by means of closed circuit television, period. That's understood.

MR. KOLODNER: And I would also like to raise the objection at this time to the use of closed circuit television on at least the theory that while I recognize that there is a statute and I recognize that this has been used in the courts in Maryland and in this very court before, but I raise the question of the constitutionality of this procedure in itself besides the people testifying today.

THE COURT: And it's understood that's an appropriate matter for the Court to consider not only the appropriateness of the use of this device in this particular case but whether or not it's permissible for the Court to do so.

MR. WARFIELD: Your Honor I—yeah, I'm not—obviously he can raise any objection that he wishes. Clearly the—that's a constitutional question which I believe is under advisement by some of our courts——

THE COURT: But it's an appropriate subject matter for this hearing today.

MR. KOLODNER: I contend that this Court could [1-32] rule today that it is not constitutional, that whether other courts in this courtroom have permitted the use of it is not material. I present to Your Honor that it is unconstitutional, that Your Honor has the right to determine whether or not it is constitutional——

THE COURT: And it seems to me that's an appropriate matter for the Court to consider.

MR. WARFIELD: Well again, I—quite frankly Your Honor, this is a little bit of a surprise from the standpoint of—obviously he cannot be precluded from raising the constitutional question and certainly he can do that. Our opposition will be based upon the fact that it is a current statute and I believe we have some authority from other jurisdictions——

THE COURT: Sure, everybody agrees.

MR. WARFIELD: —He can raise the issue.

THE COURT: The issue of one, whether or not it is appropriate for the Court to receive closed circuit television or permit closed circuit television is the issue before this Court today as well as, I guess, the constitutionality of the very statute which permits it. All the other questions dealing with the subject matter of the children's testimony, whether they are competent to testify, whether their testimony about other incidents is relevant is left for another day.

[1-33] MR. KOLODNER: Yes sir and I place before the Court that I object to this proceeding——

THE COURT: I understand——

MR. KOLODNER: —on the grounds that——

THE COURT: —and I'll consider any argument you want to make.

MR. KOLODNER: —on the grounds that the statute under which the State is bringing this motion before the Court is unconstitutional and that the use of this procedure is unconstitutuional [sic] in that it violates the defendant's right as guaranteed by the Constitution of the United States by the Sixth Amendment of the Constitution—specifically the Sixth Amendment of the Constitution of the United States in that the confrontation of the prosecuting witness or the person testifying not being confronted by the person charged.

THE COURT: May I suggest gentlemen and I'm not trying to forestall any legal arguments counsel want to make concerning the constitutionality of the statute. We've been told that we have witnesses available. Let's conduct an evidentiary hearing on whether or not the Court should consider utilizing consistent with the statute and in the course of legal argument, I'll hear from you concerning one, whether the Court as a fact finder should permit it

and two, whether it's constitutional. Let's get the evidence on. Is that appropriate——

[1-34] MR. KOLODNER: Yes sir.

THE COURT: —reserving to the Defendant the right to object.

MR. KOLODNER: Yes sir.

THE COURT: Let's proceed.

MR. WARFIELD: Very well Your Honor. The State would call Anna Hoover as its first witness please.

(Witness Sworn)

THE CLERK: State your name and address please.

THE WITNESS: My name is Anna Anderson-Hoover. My home addrsss is 624 Newbridge Court, Arnold, Maryland, and my office address is 8 Willow Street, Annapolis, Maryland.

MR. WARFIELD: All right, Mrs. Hoover, I would ask you, this is a bit of an awkward setup in the courtroom I have to——

THE COURT: Why is it awkward.

MR. WARFIELD: Well, because I'm questioning her and she's going to be responding to Your Honor, so she's got to either—either I've got to move or——

THE COURT: Do you want me to move.

MR. WARFIELD: No. If—I'm—what I'm asking I will ask you questions and if you could address your responses to the Judge I would appreciate it and I apologize for critizing [sic] your courtroom, Your Honor.

THE COURT: I didn't design this courtroom. Why [1-35] should I be sensitive about it. Whatever gave you that impression. Go ahead.

MR. WARFIELD: Very well.

THE COURT: That issue's never been raised before, the uniqueness of this courtroom.

THE WITNESS: I'll just turn my head.

MR. WARFIELD: That's okay, all right. I'll ask you the questions and if you could direct your responses to the Judge I would appreciate it.

DIRECT EXAMINATION

BY MR. WARFIELD:

Q. Mrs. Hoover, can you tell the Court what your occupation is?

A. I'm a Licensed Clinical Social Worker in private practice in Annapolis, Maryland.

Q. All right, and can you tell the Court something about your educational background please?

A. Yes. I hold a B.A. from Stetson University from 1969, major—double major, Education and Psychology. I hold a Master's Degree in Child Development from the University of Miami, Miami, Florida in child development. I hold a Graduate Certificate in Counselling from Old Dominion University in Norfolk, Virginia. I hold eighteen graduate hours in Family and Community Counselling from the University of Maryland, College Park and I have a Master's in Clinical [1-36] Social Work from the University of Maryland, Baltimore.

Q. Do you hold any certifications or licenses from the State of Maryland?

A. Yes I do. I am a Licensed Certified Social Worker, Maryland License 4776.

Q. Can you tell the Court very briefly as a Licensed Certified Social Worker how you're involved with children

who have been subjected to abuse. In other words, what do you actually do?

A. In my private practice, you mean, private practice.

Q. Yes. Well, what do you do now in that regard, tell the Court please?

A. I am in private practice. About sixty percent of the children that I see in private practice have been sexually abused. I also am a Consultant to Anne Arundel County Department of Social Services in the Silent Victim Program. I do treatment with children there. I am also involved in the training of police officers for Anne Arundel County Department—Police Department.

Q. And in the course of your work do you have occasion to be able to determine the emotional state of the young people that you work with?

A. Yes I do.

MR. WARFIELD: Your Honor, I would submit the witness as an expert at this time.

[1-37] MR. KOLODNER: Objection. I don't know what she's an expert at—to.

THE COURT: Specifically as an expert and competent to render an opinion concerning a particular subject matter which is——

MR. WARFIELD: Well—I'm—all right and the subject matter would be the emotional state of the children that—and I will follow that up with the specific children in this particular case that she is working with in terms of her therapy sessions with the children involved. So I'm submitting her as an expert to render an opinion concerning the emotional state of the individuals and their ability to testify either in court subject to a face to face confrontation with the alleged abuser as opposed to via the closed circuit television.

MR. KOLODNER: Objection, I don't think the foundation has been laid.

MR. WARFIELD: I think it's subject to his questioning.

THE COURT: Would you like to question the witness.

MR. KOLODNER: Yes.

THE COURT: Go ahead, concerning whether or not this Court should permit her to render that opinion. You can question her concerning her background or whatever—however you feel it appropriate.

[1-38] **VOIR DIRE EXAMINATION**

BY MR. KOLODNER:

Q. Now you have a B.A. from Stetson University?

A. Yes.

Q. And your Master's is in what from Miami?

A. Child Development.

Q. What courses did you take at Miami?

A. I had to take Child Development ages zero through two, five through seven, adolescents up to eighteen years old. I took Child Psychology. I had to take Personality Adjustment. I had to take Family Psychology. I took a course in Diagnosis and Treatment——

Q. A course and how many hours was that course?

A. That was a three hour course.

Q. Three hours in Personality Adjustment, okay, and what other—what else did you take at Miami?

A. I took courses in treating learning disabilities. I took——

Q. What courses did you take in learning disabilities?

A. I had approximately twenty hours of learning disabilities, diagnosis and treatment of children with learning disabilities.

Q. Twenty hours of—what is learning disabilities. What would you characterize as learining disabilities?

A. I would say a child has learning disa—there [1-39] are many diagnoses that come under learning disabilities. For instance one would be an attention deficit disorder with hyperactivity that would cause a child not to perform at school. There are many things that could fall under learning disabilities, dyslexia. I've given you two examples there. I could go through, you know, different categories of DSM-III Diagnosis if you want.

Q. And you have twenty hours of that, is that correct?

A. Yes.

Q. All right and what other training do you have?

A. I hold a Master's Degree in Clinical Social Work in which I have taken treatment. My speciality was in children. I did my internship dealing with children during that time which was a year's internship.

Q. Where was the internship?

A. I did part of it at the Y.W.C.A. Women's Center dealing with family and children there. I did part of it at Protective Services in Anne Arundel County in a Child Abuse Center. I have also—for Anne Arundel County I was appointed Child Protection Coordinator by County Executive James Lighthizer. I wrote a Grant—I wrote a three hundred and fifty thousand dollar Grant that establish a child sexual abuse and treatment program in Anne Arundel County and I established—I worked with twenty-seven agencies [1-40] establishing a treatment program and a prevention program in Anne Arundel County which is currently still in effect.

Q. Have you taken any medical courses?

A. Yes I have, in fact. I've taken a Psychopharmacology course for children.

Q. How many hours was that?

A. That was a Continuing Education Course beyond my Master's.

Q. How many hours was that?

A. That was a week's training.

Q. One week's training.

A. Um-hum.

Q. That was a medical course?

A. Yes.

Q. At a medical——

A. The University of Maryland—it was offered by the University of Maryland Medical School.

Q. And the medical course was one week, is that correct?

A. Yes.

Q. What other medical courses have you taken?

A. I have not, since I was not in medical school.

Q. Okay, so you have no training medically other than this one week of medical course, is that correct?

A. No. I did have training with Doctor Hank Giarretto [1-41] who established the Child Sexual Abuse Treatment Program in Santa Clara, California and part of that training with Doctor Giarretto was to deal with some of the physical indicators that children exhibit when they have been sexually abused.

Q. How long were you with this training group?

A. I was with Doctor Giarretto—I still consult with Doctor Giarretto. I had an intensive one week training from eight to five everyday with Doctor Giarretto.

Q. How do you spell his name?

A. G.i.a.r.r.e.t.t.o.

Q. Where is he located?

A. He's in Santa Clara, California with his wife Anna Giarretto and they have established a program, the Child Sexual Abuse Treatment Program——

Q. And you had one——

A. —which is nationally known.

Q. And you had one week training?

A. Yes. I've also attended the Chesapeake——

Q. Just I—I just didn't hear, you said one week training?

A. One week training with Doctor Giarretto and I've received supervision on cases from him.

Q. And that is the extent of your medical background, is that correct?

[1-42] A. Medical, yes. In child sexual abuse I have had further training.

Q. Okay, what is your training in?

A. I have been trained through Chesapeake Institute in Kensington, Maryland which specializes in the treatment of children and offender treatment.

Q. Chesapeake Institute, where are they located?

A. Kensington, Maryland.

Q. How long did you go to——

A. (Inaudible)

Q. How long did you go to Chesapeake Institute?

A. There have been—there have been various trainings with them. One day seminars. I've attended at least six of those from eight in the morning till five, treatment of children.

Q. Six, you—just a moment. You're going a little too fast for me. You attended six one day seminars?

A. No audible response.

Q. Okay, and what other training?

A. I've received training from the Virginia Beach Department of Social Services, their Sex Abuse Unit.

Q. What kind of training was at Virginia Beach?

A. I went down as a Consultant when I was establishing a program in Anne Arundel County and I spent a week there from—again from eight to four everyday with the [1-43] Child Abuse Unit observing their treatment, consulting, receiving training and at that time Ken Lanning of the F.B.I. was doing some training and coordination of that.

Q. And you spent one week there?

A. Yes. I have also received training from the Anne Arundel County Department of Social Services. I was a Protective Services Supervisor for two years and that entailed supervision on a weekly basis of approximately three hours for two years, supervision that I received from the Assistant Director on child abuse cases.

Q. Do you have any courses in Psychiatry?

A. No, in Psychology but not in Psychiatry.

Q. And you have no medical courses?

A. None other than what I've told you.

MR. KOLODNER: I still object to the qualifications to testify on this subject.

THE COURT: Would counsel like to elicit any other questions from the witness with reference to her background qualifications?

MR. WARFIELD: Just clarification.

VOIR DIRE EXAMINATION

BY MR. WARFIELD:

Q. Primarily your work is with children, is that correct?

A. Yes.

[1-44] Q. And as such you spend a great deal of time with the children, is that correct?

A. Yes.

Q. And——

A. I do individual and group therapy with children.

THE COURT: I'm sorry ma'am, I didn't hear you.

A. I do individual and group therapy with children who have been sexually abused.

Q. And you are—how long have you in fact been doing this? Just when did you begin?

A. It goes back to 1977 when I worked as a Sexual Assault Counselor in Tidewater Rape.

Q. And in doing this you have—you're in a position to——

MR. KOLODNER: Objection to the form of the questions. He's been leading his——

THE COURT: Don't lead the witness. I'll sustain the objection, rephrase the question please.

Q. Are you in a position to judge the emotional state of the young children that you deal with on a day to day basis?

MR. KOLODNER: Objection.

MR. WARFIELD: I think this goes to——

THE COURT: Again subject to my ruling on her ability to do so——

[1-45] MR. KOLODNER: Yes sir.

THE COURT: —I'll permit her to answer the question——

MR. KOLODNER: That's right.

THE COURT: —overruled.

MR. WARFIELD: I think it goes to qualifications because it's the core of the issue.

THE COURT: Well, I guess that's the ultimate decision I need make, but she may answer the question. You may answer the question.

A. Yes, I believe I am qualified because of my background and training.

Q. Well, I really wasn't asking—I was asking if you were in a position to judge the emotional state of the children?

A. Definitely.

Q. I'm not asking for you to state your own qualifications obviously?

A. No.

Q. But you are in a position to on a day to day basis observe and to recognize the emotional state of the children that you're dealing with, is that correct?

A. Yes.

MR. WARFIELD: All right. Your Honor, based on her training and background and for the limited purpose of [1-46] this motion, I submit this witness is an expert

for her ability to be able to judge the emotional state of the individuals involved and to render an opinion as to their ability to testify in court or not to testify in court.

MR. KOLODNER: I object to it.

THE COURT: As I understand, the evidence is that this witness is a--has a Master's Degree in Clinical Social Work, that she's a Certified Social—she's a Licensed Certified Social Worker, that she counsels children concerning child abuse, that she sees children in group and individual therapy and that she's able to, based upon her experience with children, to be able at a given point in time determine their emotional status. Assuming that it is established that the witness has some familiarity with children who are the subject matter of these proceedings. I'm satisfied that she is competent to render an opinion concerning whether the nature of a particular child's testimony in the courtroom will result in the children suffering emotional distress to the extent that they cannot reasonably communicate. So I'll permit her and the Court rules that she is qualified to render an opinion concerning that subject matter.

MR. WARFIELD: Thank you Your Honor.

DIRECT EXAMINATION

BY WARFIELD:

[1-47] Q. Mrs. Hoover, during the course of your employment have you had occasion to come in contact with a young man by the name of Brian Endres?

A. Yes.

Q. And perhaps you could spell that for the Judge?

A. E.n.d.r.e.s.

Q. And was he a referral from Howard County?

A. Yes, from the Sexual Assualt Center.

MR. WARFIELD: I might point out for the record, Your Honor, that he is the subject matter of one of the indictments in this case.

THE COURT: Of one of the indictments.

• • •

Q. Starting with Brian Endres, can you tell the Court how much time that—from your initial consultation with Brian that you've spent with him?

A. Yes. My initial consultation was on August the [1-48] 5th. I have had fifteen sessions with Brian. The sessions range anywhere from an hour to an hour and a half.

Q. And without stating specifically what was said, can you tell the Court just basically the subject matter under investigation or discussion or the subject matter of the therapy sessions.

A. The subject matter of the therapy sessions had to do with sexual abuse of Brian by Mrs. Craig.

Q. All right. Based upon your contact with Brian and your expertise that's already been acknowledged by the Court, do you have an opinion as to Brian's ability to come into this courtroom and testify face to face with Mrs. Craig as opposed to being permitted to testify by way of closed circuit television outside of the courtroom? Do you have an opinion?

A. Yes.

Q. All right and can you tell the Court again based upon your expertise in the area and based upon your contact with Brian Endres, what that opinion is?

A. I believe that Brian could not testify in an open courtroom such as this. That it would cause him severe emotional distress. Brian experiences panic disorders, night terrors and this child's level of anxiety is increasing. I

have concerns this child may decompensate in an open courtroom situation.

[1-49] Q. And how would that affect his ability to communicate if he were in the courtroom?

A. I don't think he would be able to communicate exactly what happened to him.

Q. And that would be in a face to fact context as opposed——

A. Yes.

Q. —to closed circuit, is that correct?

A. Yes.

MR. WARFIELD: I have no further questions, counsel. I submit, Your Honor, on the basis of the testimony. I believe she's subject to cross-examination on——

THE COURT: With reference to that one child.

• • •

[1-50] THE COURT: Cross.

[1-51] **CROSS-EXAMINATION**

BY MR. KOLODNER:

Q. Both of these children were referred to you by the Sexual Assault Center?

A. Yes, Howard County Sexual Assault Center.

Q. And both would have the experience, the exact same problem if they were to testify in the courtroom, is that correct?

A. They would both experience a high level of anxiety. It may come out in different behaviors but basically they would exhibit an extreme amount of anxiety.

Q. How would that anxiety show itself?

A. When Todd discusses the incidents, Todd stutters, he crys, he withdraws, he is scared to death. There is fear, he trembles. Brian has at times withdrawn into a fetal position when discussing the events. Again, the level of anxiety has become extremely aggressive. So the anxiety's displayed in different ways with these children. Tearfulness.

Q. Would that—the reaction occur if she would—if either of these children would see Mrs. Craig walking on the street or is it just in the courtroom?

A. No, I'd imagine it would happen on the street. Both children expressed the fear that they did not want to see Mrs. Craig again and have asked me if they will see Mrs. Craig again

[1-52] Q. So if they ever had any contact with Mrs. Craig that would be the reaction in your belief?

A. In my belief, yes, that these children would have an extreme anxiety reaction to that or a face to face confrontation, yes sir.

Q. In order to clarify it in my own mind, if Mrs. Craig would pass them on the street, you feel as though that there would be a severe reaction as to each of these children, is that correct?

A. I believe both children would have a reaction. I believe—you're talking about two situations, one out in public and one in the courtroom where there's more stress in a courtroom. I believe in both situations they would have a reaction to seeing Mrs. Craig. Both children are experiencing night terrors, nightmares about seeing Mrs. Craig have asked me and the police officers involved in this case not to see Mrs. Craig.

Q. So they've asked most of the people that they've come in contact with regarding this matter that they didn't want to see Mrs. Craig, is that correct?

A. Yes.

Q. Who was present when you would have a session with the first child?

MR. WARFIELD: Excuse me. I didn't hear that.

Q. Who was present?

[1-53] THE COURT: Who was present when she consulted with the first child, Brian?

MR. WARFIELD: Objection, that's beyond the scope. I think we're getting into the area that we discussed in chambers in terms of the other—the questioning and all that sort of thing. I don't believe that's relevant to these proceedings.

THE COURT: Well, I believe the bases for this witness' opinion and to the extent that she made certain observations which lend themselves to her opinion it seems to me it's relevant. So for that limited basis I'll overrule the objection. You may answer it.

Q. Officer Beth Healy was present in sessions with both Brian and Todd where they both expressed they did not want to see Mrs. Craig and they were fearful of Mrs. Craig.

Q. Does that also apply to Todd Fussell?

A. Todd Fussell, yes. In both instances, Officer Beth Healy was present and heard the children say that they wanted for her to protect them against Mrs. Craig and they asked some questions about it.

Q. Did Officer Healy ask any questions while you had this session——

MR. WARFIELD: Object——

Q. —of the children?

MR. WARFIELD: —I'm going to object, Your Honor, [1-54] again I don't think that's relevant to this witness'

qualifications, number one, and number two, to this witness' ability to be able to judge the issues at hand. We're getting beyond that and I don't—that's precisely what we address——

THE COURT: I would agree, I would agree. The basis of this witness' observations of these children is the predicate for her opinion. The extent to which she accurately saw, observed, listened to, perceived statements, demeanor of the children is relevant. The extent to which others may have seen her with these children is relevant, but that's it, not what those other's said. The accuracy of this witness' observations is relevant. So to the extent that others could have seen what she saw or heard what she heard, that's relevant, but the extent to which the others participated or questioned or inquired of at this juncture for this purpose I don't see as relevant. That was long winded but do you see the gist of what I'm saying?

MR. KOLODNER: Yes sir.

Q. During these sessions did you ask questions of each child?

A. Yes.

Q. Besides Officer Healy was anyone else present?

A. I believe in two sessions with Brian Endres I had [1-55] the one-way mirror that we use and on the other side of the one-way mirror, was a parent and her attorney and observed the session.

Q. A parent and an attorney?

A. Yes.

Q. Brian Endres' mother and Brain's—and her attorney observed. Any parent is welcome and I would make this offer to any parent that they can or—that I have a one-way mirror if they would like to observe the session and this goes for any child that I work with.

Q. Was the attorney present in the room while you were talking to the child?

A. No.

Q. Was he brought to the interview by the attorney?

A. No.

Q. Did the attorney arrive later?

A. Yes.

Q. How often was the attorney there?

A. Once.

Q. Did Todd Fussell also have an attorney present?

A. No.

MR. KOLODNER: All right, I have no further questions sir.

THE COURT: Any redirect.

MR. WARFIELD: No sir.

[1-56] THE COURT: Thank you ma'am, you may step down.

MR. WARFIELD: Your Honor, on the basis of the testimony, I would submit that at this point if I may be permitted on a witness by witness basis. The State has no further testimony in support of the motion pursuant—the motion for closed circuit as it relates to Brian Endres and Todd Fussell. At this time I would move—or I would ask the Court to rule that in both of those cases pursuant to Section 9-102, Courts and Judicial Proceedings Article that any testimony whether it be in their own case or as witnesses in another case be permitted by way of the closed circuit television as provided for in the Statute.

THE COURT: I understand the defendant would reserve the right to argue the constitutionality of this par-

ticular process. May I inquire, does the defendant wish to introduce any evidence concerning this issue.

MR. KOLODNER: No, but I would like to renew—do I have a continuing objection to this.

THE COURT: Well, I haven't ruled on the appropriate—two-fold. As I see it there's an evidentiary hearing. It seems to me you each have a right to offer evidence on this particular issue. As I understand it, the State submits that it is appropriate for me to receive testimony by way of closed circuit t.v. concerning these two children. As I understand it, the defendant doesn't [1-57] wish to offer any evidence on that issue but would reserve the right to argue, one, that the statute's not constitutional and I guess, two, whether based on the evidence presented I should allow or should not allow. Let me reserve ruling on that issue and put it all off to the end, but we have—but we have—both parties have presented all the evidence they're going to present with reference to the appropriateness of this Court receiving closed circuit t.v. with reference to these two children.

MR. KOLODNER: Yes sir.

THE COURT: Good and then I'll reserve ruling on whether or not it's appropriate and/or constitutional for me to do so.

MR. WARFIELD: Very well Your Honor. All right. The State would then call for the next witness Your Honor, Mary Burke please.

(Witness Sworn)

THE CLERK: State your name and address for the record please.

THE WITNESS: My name is Mary F. Ellis (inaudible).

THE COURT: Ma'am, I'm sorry, Mrs. Burke. You're going to have to speak up louder. I'm having a tough time hearing you.

THE WITNESS: My name is Mary F. Ellis, spelled with an "E" Burke and my address is 1115 Elkridge Linthicum [1-58] Road, Linthicum, Maryland.

MR. WARFIELD: Mrs. Burke, as I told the last witness and I believe you were in court, please address your responses to the Judge and I will be asking you the questions.

MARY F. ELLIS BURKE,

a witness called on behalf of the State, having been duly sworn, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. WARFIELD:

Q. Can you tell the Court your—the nature of your employment please?

A. Yes. I work as a Child Therapist with the Howard County Sexual Assault Center.

MR. KOLODNER: I'm sorry, I could not hear the answer.

THE COURT: Can you turn the mike on Madam Court Reporter. Maybe if you spoke right into the mike. I also didn't design the accoustics in this courtroom either.

(Reporter's Note-microphone in front of the witness not working at this time, not known until tested after witness left stand)

A. I work as a Child Therapist with the Howard County Sexual Assault Center.

[1-59] THE COURT: Can you hear Mr. Kolodner.

MR. KOLODNER: I heard that, yes sir.

THE COURT: We can hear you clearly.

MR. KOLODNER: Thank you.

MR. WARFIELD: Fine.

BY MR. WARFIELD:

Q. And can you please tell the Court your educational background and training and if you could be as thorough as possible, perhaps we can avoid some further questioning.

A. I hold a Bachelor's Degree in Child Behavior and Development from the University of Iowa——

MR. KOLODNER: I'm getting—can't hear now. Perhaps I'll move over to where she is.

THE COURT: Sure, why don't you.

MR. KOLODNER: Would that bother you.

THE COURT: It won't bother me. If it bothers—I'm sorry.

MR. KOLODNER: I'll just stand here.

THE COURT: Why don't you have a seat over there Mr. Kolodner. Just don't look at counsel's notes on the trial table in front of you.

MR. KOLODNER: I wouldn't dare do that.

THE COURT: I've heard a concern of counsel that jurors might see their notes, but I've never had them argue [1-60] to me that other lawyers, opposing lawyers could see their notes in this courtroom. Go ahead Mrs. Burke, I'm sorry.

MR. WARFIELD: Yeah, if we can start over please sir.

A. I hold a Bachelors Degree in Child Behavior and Development from the University of Iowa in 1973. I hold

a Master's Degree in Counseling Psychology and Human Development from Antioch University in 1981. I have training in working with sexually abused children and adults. Four and a half years of working in Anne Arundel County's Sexual Assault Center. A year as a counselor with Prince George's County Sexual Assault Center and approximately fifteen months with the current Howard County Sexual Assualt [sic] Center. I've received as I said training at Anne Arundel from Brenda Robinson who was the Clinic Director at Prince George's, from Dr. Linda Set who's a Clinic Director under Dr. Cohen, Home Psychiatry and I'm currently receiving clinical supervision from Dr. Gladys Sweeny on a bimonthly basis.

Q. All right, and are there any other courses that you've attended, training type courses or any other educational facilities that you've attended other than what you've already testified to which would—which qualify you in this particular area?

A. I've attended several workshops which have been [1-61] sponsored by various agencies. Some of them are more or less relevant to the immediate issue of child sexual abuse and they all deal with children and children's rights issues. Some are specific to child sexual abuse issues. Some are clinical questions of issues.

Q. All right, and as a practical matter, how long have you been working with abused children?

A. Well, I guess intermittently it began when I was with Anne Arundel. It began in 1981 through the present.

Q. Okay, from 1981 through the present and you are—your work week so to speak is—how many hours do you devote to this endeavor during the week?

A. Well, I'm currently thirty-five hours that I'm paid and the rest is comp. time. It's a full-time position.

Q. And what amount of that time is spent with children?

A. One hundred percent of my time is spent with children and their families. I provide support and services, individual counseling and group for the parents and secondary victims which would include brothers and sisters of the child victims.

Q. And in what percentage of these children is there an allegation of abuse?

A. One hundred percent of the children come to the sexual assault center because there's a suspicion or an [1-62] allegation of sexual abuse.

Q. So you are working specifically with allegations of sexual abuse as they pertain to children, is that correct?

A. Yes.

Q. All right, and how long have you been with the Howard County Sexual Assault Center?

A. Approximately fifteen months.

Q. Fifteen months and prior to that you were with Anne Arundel County, is that correct?

A. Prior to that I was with Prince George's County.

Q. I'm sorry, Prince George's and then prior——

A. That was about a year and before that I was with Anne Arundel.

Q. And when you were with Prince George's County and Anne Arundel County were you doing the same thing that you're doing now, primarily?

A. Anne Arundel would have been less—I guess it was less in the way of one on one therapy. It was more crisis intervention then [sic] corrective therapy which would be on a short term basis for six to twelve months.

Q. And what is your official title if there is such a thing? What is your—what is your specific job title?

A. My job title is Child Therapist.

Q. Child Therapist.

MR. WARFIELD: All right, I would submit to [1-63] counsel at this point, Your Honor, on the basis of qualifications.

THE COURT: Mr. Koloder, would you like to question the witness?

MR. KOLODNER: Yes.

VOIR DIRE EXAMINATION

BY MR. KOLODNER:

Q. You say you received your B.A. in Child Behavior, where was that?

A. It's Child Behavior and Development at the University of Iowa.

Q. How long did you go there?

A. How long did I go to the University of Iowa?

Q. Yes.

A. I went there two years.

Q. Two years and what shcool did you go after that?

A. After I graduated from the University of Iowa?

Q. Yes, yes.

A. Antioch.

Q. How long did you go there?

A. For approximately two years.

Q. And since that time what do you do or what is your function in Howard County, for instance?

A. My function is to provide evaluations and to provide counseling to children who are victims of child [1-64] sexual abuse and their families.

Q. Do you have any medical training?

A. I don't—I never took medical courses. I have medical training when I was at the Prince George's County Sexual Assault Center. I assisted the interns and physicians in examinations of victims. That was a part of evidence production.

Q. But you have no medical training, is that correct?

A. No sir. I have no medical training (inaudible).

Q. You have no training in Psychiatry?

A. No, I do not.

Q. So what you do have is a B.A. in Child Behavior, is that correct?

A. Behavior and Development.

Q. Behavior and Development and what do you do at Howard County? When someone files a complaint you check to see if the child has been abused?

A. Yes.

Q. And then what do you do?

A. Then I provide therapy and counseling services to the child to allow him to (unable to hear)——

THE COURT: Mrs. Burke, I'm sorry, you're not—just speak into the mike. I'm sorry, you're not being heard by the court reporters. I can hear you and I think counsel can hear, but the court reporter can't hear you. Don't [1-65] worry about me. You just talk into that microphone. If counsel can't hear you somebody will tell me. If the court reporter can't hear, she'll tell me.

Q. Okay, now what was your answer.

THE COURT: The question is what do you do at the Howard County?

Q. What was your answer?

A. I don't remember what my answer was specifically. What I do is I have children who are referred to me. I meet with those children. I interview them and their families. I provide evaluations in terms of observation of their behavior, assessment of whether or not the behavior that I observed would be consistent with those of a child that could be sexually abused, provide follow-up counseling services to those children and their families until they establish a degree of coping within their lives.

MR. KOLODNER: Sir, if this is—do you have anything else to ask her?

MR. WARFIELD: On this, no.

MR. KOLODNER: Well then, I would object to her qualifications then.

THE COURT: Pardon me gentlemen, let me just ask a question or two of the witness.

VOIR DIRE EXAMINATION

BY THE COURT:

[1-66] Q. Are you licensed by the State in any fashion ma'am?

A. No, I'm not.

Q. You said you had a Bachelor's Degree from the University of Iowa. You have a Master's Degree also?

A. Yes.

Q. In what field?

A. Counseling Psychology and Human Development.

Q. Yes I do.

Q. When I say counsel, you give them some guidance, try and help them out, is that what you do?

A. That's part of what I do, yes.

Q. Sure. Can you perceive distress in the children who come before you? I mean, can you observe it?

A. Some children manifest distress so it can be outwardly observed, others do not.

Q. But based upon your training if a child exhibits distress while that child's in counseling—in consultation or in therapy, can you perceive it?

A. Yes.

Q. And how do you perceive it?

A. We perceive it in relationship to a normal description for that child's behavior, in terms of you reference it agianst [sic] a normal population of children of that particular age and development. You listen to their [1-67] speech. You listen to vocabulary development, watch physical manifestations, you watch their behaviors in the session, you listen for crying, you listen for a disruption of the speech patterns. Many of these assessments are used to determine whether a child is anxious or fearful or in stress.

THE COURT: Gentlemen, you would like to—first of all, have you any other questions of the witness, excuse me.

MR. WARFIELD: We're on qualifications at this point.

THE COURT: On qualifications.

MR. WARFIELD: I don't have any further. Just a follow-up to the Court's questions.

VOIR DIRE EXAMINATION

BY MR. WARFIELD:

Q. Mrs. Burke, you said you're not licensed. You're not—I'll ask it in a nonleading fashion. What if any licensing

requirements are there for you to function in the area that you're functioning now?

A. To my knowledge there are no licensing requirements and there is no licensing available in the State of Maryland for people who hold a Master's Degree in Counseling Psychology.

MR. WARFIELD: I would submit on her qualifications. Her lack of licensing, Your Honor, is not something—in [1-68] other words, she—her thing that she does, does not require—there's no license required for that, for her to function as such. I would submit her as qualified.

THE COURT: Mr. Kolodner, would you like to be heard on the issue of her qualifications?

MR. KOLODNER: Yes. I object to her qualifications to determine whether or not she can voice an opinion as to whether or not there would be trauma, trauma, to a child testifying in a courtroom and I think that's what she would have—she would have to give a medical opinion and I don't think she's qualified to do that. I don't think she—she has nothing more than a B.A. in Child Therapy.

THE COURT: Thank you sir. I'm satisfied from the interrogation of the witness that by virtue of her training and background and her present employment that she is competent to testify with reference to the issue of whether a particular child who might be called to testify in this proceeding might suffer serious emotional distress so that the child could not reasonably communicate in a courtroom and I'll permit her to render an opinion concerning that subject matter assuming she's familiar with a child that might be relevant to these proceedings.

DIRECT EXAMINATION

BY MR. WARFIELD:

[1-69] Q. Mrs. Burke, could you please tell the Court what if any children were referred to you as a result of alle-

gations of abuse at the Craig's Country Day—let me rephrase that Your Honor. I think for expedience if I could name various children it might be more beneficial. During the course of your employment have you come in contact with a Brooke Etze?

A. Yes.

THE COURT: I'm sorry.

MR. WARFIELD: Brooke Etze, Your Honor.

THE COURT: E.t.z.e.

MR. WARFIELD: Yes.

THE COURT: Thank you.

Q. Have you come in contact with a Justin Peeples?

A. Yes I have.

MR. WARFIELD: P.e.e.p.l.e.s.

Q. And a Jessie Sue Smith?

A. Yes I have.

• • •

[1-72] **DIRECT EXAMINATION CONTINUED**

BY MR. WARFIELD:

Q. As it relates to Brooke Etze, can you tell the Court how much time you spent with her?

A. I've seen Brooke approximately twenty sessions and a session is—varies from one to one and a half hours.

Q. Can you tell the Court without going into any specifics what the subject matter of the sessions was?

[1-73] A. Yes. I'm seeing Brooke on issues relating to alleged sexual abuse by Mrs. Craig.

Q. Have you as a result of these sessions been in a position to determine her emotional state as it relates to her being able to relate the incidents involved?

A. Yes.

Q. Have you formed—based upon your training and expertise have you formed an opinion as to her ability to be able to come into a courtroom during the course of these trials and testify face to face with Mrs. Craig?

A. Yes I have.

Q. On the basis of your training and expertise and contact with Brooke Etze can you tell the Court what that opinion is?

A. Yes. My opinion is that it would be very difficult if not impossible for Brooke to sit in the same room with Mrs. Craig and discuss the alleged abuse incidents. I believe it would also be difficult for her because of her age to sit in front of a group of strangers whether they be Mrs. Craig or any other person and discuss the allegations. A second factor would be (unable to hear witness) she perceives herself as having been threatened. She truly believes that those threats will be carried out against her.

Q. By whom is she perceiving the threats?

A. She's perceiving that she was threatened by Mrs. [1-74] Craig and that she feels that her life is in jeopardy and part of her family and the household pet and I find that it would be very difficult for her to sit in front of this person and be able to tell what she thinks happened to her.

Q. And can you characterize that in terms of emotional distress in the courtroom and ability to communicate in the courtroom?

A. Yes. I think that Brooke coming into the courtroom where she would be faced with the alleged perpetrator and

a group of strangers would be unable to talk about what happened to her. She currently in preparation for the pending hearings is experiencing disruption in her breathing which is definitely manifesting distress and fear and anxiety visible in a physical manner and also an emotional manner.

MR. WARFIELD: Your Honor, if I could then go on to the next one rather than let counsel——

THE COURT: Sure and then we'll let counsel—would that be appropriate, just question the witness——

MR. WARFIELD: —rather than go one at a time.

THE COURT: Sure, go ahead.

Q. As to Justin Peeples, how much time have you spent with him?

A. I've seen Justin approximately eighteen sessions.

Q. And again are they in the same duration range as [1-75] the other one?

A. Yes.

Q. And can you state the subject matter of the sessions with Justin Peeples?

A. Yes. I'm seeing Justin because there are allegations of sexual abuse taken by Mrs. Craig.

Q. And in the course of these sessions have you—are you in and have you been in a position to judge and to gauge his emotional state as it relates to relating the incidents involved?

A. Yes.

Q. Do you have an opinion based upon your expertise and your observations of Justin Peeples as to his ability to testify in the courtroom concerning the matters in this case as opposed to outside of the courtroom via closed circuit television?

A. Yes.

Q. All right, and what is that opinion, again, based on your training, expertise and your contact with the young man involved, Justin Peeples?

A. For Justin, I believe that Justin would be, once again, he would have great difficulty talking in front of people, particularly in front of Mrs. Craig, whom he sees as a threatening figure.

Q. He sees as what, I'm sorry.

[1-76] A. As a threatening figure. Justin has had difficulty talking to me about what happened. He's had difficulty talking—making his disclosures to other people including police and protective services. He tends to change the subject which is his manner of avoiding the issue. He becomes agitated and depressed. He bursts into tears and would be unwilling or unable at that point to proceed.

Q. All right, and as to—well, can you relate—can you relate that to the—to emotional distress and to ability to reasonalby [sic] communicate?

A. Yes. I think that it would be very—it would impair his ability to communicate. My feeling is that if the goal would be to allow this child to be heard, to maximize that opportunity you would provide him with privacy in his disclosure and to remove the threatening agent which he perceives as Mrs. Craig.

Q. All right. As to Jessie Sue Smith, how much time have you spent with her?

A. I've seen Jessie approximately thirty-six sessions.

Q. Thirty-six sessions and the duration of those sessions?

A. Again, approximately an hour to an hour and a half per session.

Q. During the course of your meeting with Jessie Sue [1-77] Smith, have you had occasion to observe her emotional state as it relates to her ability—as it relates to her relating the incidents involved?

A. Yes.

Q. All right, let me back up one. What was the subject matter of the sessions with Jessie Sue?

A. The sessions were dealing with Jessie's allegations of sexual abuse of herself by Mrs. Craig.

Q. And what if any portion was devoted to allegations concerning Jamal Craig?

MR. WARFIELD: I might point out for the record, Your Honor, that there are two cases involving this individual, one against Jamal and one against Mrs. Craig, so I would ask the Court to take into consideration the dual—a request for a dual ruling as it relates to each case. So we have a single victim of two—of two separate individuals here and a ruling would be requested in each case, just for the Court's understanding.

Q. Were there—what if any subject matter concerning allegations of Jamal Craig?

A. Yes, there were allegations of sexual abuse by Jamal in a large percentage of the sessions with Jessie. We also went over those allegations.

Q. All right, and as they relate to Mrs. Craig?

A. A smaller percentage but again there were allega-
[1-78] tions.

Q. And do you have—and based upon the time spent with her, with Jessie Sue Smith and your expertise, do you have an opinion as to her ability to testify in either of those two cases in court regarding those allegations?

A. Yes.

Q. Okay, and again based on your expertise and your contact with Jessie Sue Smith as to Mrs. Craig can you tell the Court what that opinion is?

A. As to Mrs. Craig, she perceives herself, again, as her life has been threatened, that of her parents and her sibling too. She believes that that—Mrs. Craig is capable and willing to carry out those threats at home and Jessie is fearful of this person. I believe that that fear would impair her ability to sit in front of that person or to be in the same room with that person, would be unable to discuss or to share with the required individuals that information which she has to share regarding these allegations.

Q. How does that relate to emotional distress?

A. Well, Jessie has been in therapy for over a year at this point trying to deal with the issues that have been surfaced regarding the stress and disruption of her life emotionally. I think that that would be a step-back for [1-79] Jessie to have to face this person. I think that her fear, again, that her life may be jeopardized or that of her family, when discussing it, was a problem to her. I feel it would cause her not to share that information.

Q. Now, as it relates to Jamal Craig, do you have an opinion on her ability to be able to come into the courtroom and testify as it relates to Jamal Craig?

A. Yes.

Q. All right, and what is that opinion?

A. I think it would be very difficult again for this child to come into the courtroom and discuss what happened to her. I think, again, it would be difficult because of her age, because of the sensitive nature of the allegations, the invasion relative to her body and privacy.

Q. And can you describe based upon your training and experience and also your contact with her what her emo-

tional state would be if she were required to come into the courtroom and testify against Jamal Craig in court?

A. I think she would become anxious, agitated, fearful. I think those things could contaminate her testimony.

Q. What would the result be on her ability to communicate?

A. I think that would constrict here [sic] ability to communicate.

[1-80] Q. And that would be as it relates to Jamal Craig, is that correct?

A. Yes.

* * *

[1-82] **CROSS-EXAMINATION**

BY MR. KOLODNER:

* * *

[1-83] Q. Well, let's talk about Brooke Etze, what would that child do? What do you think the reactions as to that child would be?

A. I think that Brooke would probably stop talking and she would withdraw and curl up.

Q. Would that occur also if she would just see Mrs. Craig in a room someplace or walking on the street?

A. I think that would vary if Brooke's parents were available and if Brooke felt that she could escape. I think that you might see a variable response.

Q. Would become dispondent[sic], is that what you said?

A. No, no, I didn't say that. I said I—I said that I thought that the response could vary if Brooke's parents were present, if there were an opportunity for her to

escape, that she might or might not respond in the way that you suggested.

Q. And now as to Justin Peeples, what do you think the reaction would be if she were brought in court—if he were brought in court?

A. If Justin was brought into the courtroom?

Q. Yes.

A. Well, I think that Justin would become highly agitated, that he may refuse to talk or if he did talk, that he would chose [sic] his subject regardless of the questions.

Q. What do you think that his reaction would be if [1-84] he were just—just came in contact in an ordinary manner with Mrs. Craig such as in a room or on the street or at her home?

A. I don't think you would ever find Justin voluntarily walking into her home if he knew in advance that's what he was doing.

Q. He would refuse to go to her home?

A. Yes, if he had the opportunity to refuse, he would.

Q. Going back to Brooke would she also refuse to go to Mrs. Craig's home?

A. I would imagine that she would. Again that's real speculative. I never asked her that question.

Q. What do you think the reaction of Jessie Sue Smith would be if brought into the courtroom to testify?

A. I think that she would probably—Jessie would probably look around and become extremely timid and unwilling to talk.

Q. What would her reaction be, do you believe, if she had contact with Mrs. Craig outside of the courtroom at her home—at Mrs. Craig's home for instance—if taken to her home?

A. I—again, I've had no opportunity to, you know, that's speculative. I think that that situation would never occur.

[1-85] Q. She would refuse to go there if told, is that what you would believe?

A. Yes.

* * *

[Certificate of Court Reporter omitted in printing]

[2-1]

IN THE CIRCUIT COUR[T]
FOR HOWARD COUNTY, MARYLAND

Criminal Case Nos.
15458, 15459, 15460, 15461, 15462, 15463, 15464, 15465, 15466, 15467, 15469, 15625 and 15737

Criminal Case Nos.
15468 and 15568

STATE OF MARYLAND

Vs.

SANDRA A. CRAIG

And

JAMAL D. CRAIG

Defendants

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS
(Motions)

VOLUME II OF II

Howard County, Maryland
Wednesday, January 21, 1987

BEFORE:

HONORABLE RAYMOND J. KANE, JR.

APPEARANCES:

For the State:
A. G. Warfield, Esquire

M. C. O'Donnell, Esquire

For the Defendant:

F. Kolodner, Esquire

Janet Falkenstine-Secretary/Court Reporter
Circuit Court for Howard County
8360 Court Avenue
Ellicott City, Maryland 21043

[2-7] • • •

MR. WARFIELD: Thank you Your Honor. Again, renewing the situation where we were yesterday, this is a continuation of the State's motion on closed circuit television and in that—in pursuance of that particular motion we would call Dr. Gladys Sweeney as our next witness.

(Witness Sworn)

THE CLERK: Would you state your name and address for the record please.

THE WITNESS: My name is Gladys Acevedo Sweeney and the address is 6823 Grimes Golden Court in Columbia, 21045.

MR. WARFIELD: Dr. Sweeney, I would ask you to—I will be asking you certain questions and defense counsel will ask you certain questions and if you could direct your responses to Judge Kane, I would appreciate it, and try to use the microphone as best you can.

GLADYS SWEENEY,

a witness called on behalf of the State, having been duly sworn, took the stand and testified as follows:

[2-8] **DIRECT EXAMINATION**

BY MR. WARFIELD:

Q. Can you tell the Court your occupation and profession please?

A. Yes, I'm a Clinical Psychologist and I'm currently working in Columbia, private practice.

Q. In private practice?

A. Yes.

Q. And can you tell the Court your educational background please?

A. Yes. I hold a Psychologist's degree from Catholic University in Chile and that program is a six year professional program and I'm licensed to practice Clinical Psychology in Chile. I graduated in September of '75. I hold a Master of Education Degree from the Pennsylvania State University majoring in Rehabilitation Counseling, graduated in May of 1979. A Doctor of Philosophy from Penn State University, major in Counseling Psychology, graduated in May of 1981. I'm licensed to practice Psychology in the state of Maryland.

Q. When did you receive that license?

A. It was in March of 1983.

Q. And your profession as stated previously is as a practicing Psychologist, is that correct?

A. That's correct.

[2-9] Q. What percentage or what amount of time do you devote to dealing with children in your profession?

A. My practice—my practice currently consists of approximately twenty hours a week of direct patient contact. I have cut down my hours a little bit considering I'm expecting my third child and thirty-five percent of that practice is direct evalua—direct contact with children that have been sexually abused. That does not include two hours a week of supervision that I give to the staff of the Howard County Sexual Assault Center supervising cases of children that have been abused. In my past experience I have worked at the Johns Hopkins University School of

Medicine. I've been a member of their faculty in the Department of Child Psychiatry and while I was there my practice consisted of about thirty percent, a third, involved the evaluation and treatment of sexually abused children, but also in direct training under the direction of Dr. James Connaughton, and Dr. Rosenberg on how to treat and evaluate children with sexual abuse history.

Q. Dr. Sweeney, in the course of your practice and in dealing with the children, are you in a position to be able to judge their emotional state as it relates to their ability to communicate with you and others.

A. Yes.

Q. Other than the—than the information which you've [2-10] already given as to your educational background, do you have any other credentials concerning courses or any other academic studies that you've undertaken in this field?

A. As I mentioned before, I have had specialized training while at Hopkins. I've also taken special workshops dealing with evaluation and treatment of children that have been sexually abused. I have given workshops relating to the area and I have also been qualified before as an expert in court cases dealing with these particular kind of problems.

Q. Specifically let me ask you, have you testified previously concerning the ability of a child to testify in court or to be—or to, in fact, be permitted to have testimony via closed circuit television. Have you testified on that issue?

A. Yes I have.

Q. Have you been qualified as an expert to give your opinion on that issue?

A. Yes I have.

MR. WARFIELD: Your Honor, I would submit this witness as an expert and submit to cross-examination on qualifications at this time.

THE COURT: Mr. Kolodner.

CROSS-EXAMINATION

BY MR. KOLODNER:

[2-11] Q. Do you have any medical training?

A. I don't have medical training. I have a Doctor of Philosophy and I have been a member of the Medical Faculty at Hopkins, but I do not have medical training.

Q. How long were you at Hopkins?

A. From 1981 until 1983, full-time and then I stopped—I was expecting my first child, went back half-time with a faculty appointment and stopped agian [sic] in '84 expecting my second child.

Q. What did you do at Hopkins?

A. I was the Senior Psychologist at the Children's Mental Health Center under the direction of Dr. Connaughton. I was in charge of the Clinical Psychology Practical Placement supervising in Psychodiagnostic and Therapy of the students in Clinical Psychology of the Phd. program at University of Maryland. I also provided clinical services in psychotherapy and evaluation to eligible children. As I said thirty percent of my time was in dealing with sexually abused children there. That's basically what my duties were while at Hopkins. I also did some——

Q. You also did what?

A. I also did some research while I was there.

MR. KOLODNER: I have no further questions.

THE COURT: All right. I will permit the witness to testify as an expert and to render an opinion concerning

[2-12] whether the testimony of a child who is—might be a witness in this, whether or not, in fact, that child's testimony in a courtroom would result in the child suffering serious emotional distress, such that the child could not reasonably communicate.

MR. WARFIELD: Thank you Your Honor.

DIRECT EXAMINATION

BY MR. WARFIELD:

Q. Dr. Sweeney, I would ask you if in the course of your profession and occupation have you had occasion to come in contact with a young man by the name of Drew Woodbury?

A. Yes.

Q. And can you tell the Court the extent of your contact with him, specifically the amount of time that you have spent with him. You don't have to break that down on a day by day basis, but generally?

A. All right. I have seen Drew for about nineteen sessions, approximately for about nineteen sessions, and I saw him in connection—for an evaluation to see whether this child had been sexually abused while attending Criag's [sic] Country Pre-School.

Q. All right, and the approximate duration of each of these sessions is how much?

A. About an hour. Sometimes—sixty minutes. [2-13] Sometimes—occasionally it goes a little longer, but as an average sixty minutes.

Q. All right and—I would ask you not to reveal any specific statements that were made during the course of these sessions, but can you tell the Court the general subject matter under discussion or that was—what was the general subject matter of the meetings with the child?

A. The general subject matter discussed is I asked him to tell me about his experience while attending Craig's Country Pre-School and other areas that were—that have been important for the child right now. It's not exclusively that, but other things too.

Q. So the subject matter was alleged abuse at the School?

A. That's right.

Q. And who was the alleged abuser in that particular case?

A. In this particular case——

MR. KOLODNER: I object.

MR. WARFIELD: Well, again, I—it's only for foundation purposes.

THE COURT: Well, again, it's only relevant and it only, as I see it, goes to the issue of whether or not testimony of the chld [sic] should be taken by means of the closed circuit television and whether or not it's necessary for [2-14] the Court to do so. That's the sole purpose for this Court receiving this evidence, so I'll overrule the objection.

Q. Who's the alleged abuser in that case?

A. The alleged abuser in this particular case is Mrs. Craig.

Q. All right. Now Dr. Sweeney, based upon your training and experience and based upon your—the time that you have spent with this child, have you been able to form an opinion as to the ability of this child to come into the courtroom with Mrs. Craig present in the courtroom and to testify or, in the alternative, to be permitted to testify by way of closed circuit television. First of all, do you have an opinion on that subject?

A. Yes I do.

Q. All right. Again now, based upon your experience and training, your expertise, and based upon your contact with this child, can you tell the Court what that opinion is?

A. I personally believe—my professional opinion in my observations in the sessions with Drew that he would—he has experienced extreme level of high anxiety and distress by talking about this very traumatic event and that his ability to communicate would be grossly impaired if he were to testify in an open court in the presence of Mrs. Craig.

[2-15] Q. Can you characterize his level—his emotional state would he be required to come into the courtroom?

A. One of the many ways a Psychologist has to evaluate emotional state of children is observe different indexes indicating anxiety. One of them is behavior and in this particular case Drew has shown extreme regressive behavior, thumb sucking, you know, wanting the blanket, wanting clingingness, extreme dependency, all those kind of behaviors whenever he talks about the traumatic event that he has difficulty communicating to me in a session after he already has a rapport with me that I particularly feel he would be very—his ability to communicate would be very impaired if he were to talk about these private events in front of strangers and particularly in front of Mrs. Craig.

Q. And as to his emotional state at that particular time? You've testified he would have difficulty in communicating. How would that relate to emotional distress in the courtroom. In other words, what would his emotional state be if he were required to come into the courtroom that's what I'm asking?

A. Oh, I think he would—he would be highly, highly distressed and it would show in different ways.

Q. That's really the question that I'm asking.

A. Yes.

MR. WARFIELD: Your Honor, I—that would be all [2-16] the questions I have. Counsel.

CROSS-EXAMINATION

BY MR. KOLODNER:

Q. Would he be highly distressed if he had to testify under any conditions?

A. How do you mean by that Mr. Kolodner?

Q. Well, wouldn't he be upset if the Judge asked him questions and if he were just alone with the Judge?

A. I think that it causes him anxiety to talk about these issues no matter who asks the questions, but I think the point is to minimize the anxiety and I think what causes him—would cause him the most anxiety would be to testify in front of Mrs. Craig, the alleged perpetrator.

Q. What reaction do you think that he would have if he were required to testify in this courtroom in the presence of Mrs. Craig?

A. Well, I can't predict one hundred percent what kind of behavior he would have, or reactions he would have, but I can tell you my opinion based on what I have seen while he's been in sessions with me. One of the things that I do is compare his reaction and his behavior when he talks about general non-threatening topics such as school now, things that are going on at home and he is fine. But when he's talking about the traumatic events that happened while attending Country Pre-School, he has a great deal of [2-17] difficulty communicating that to me—or has had a lot of difficulties. Has been very anxious, as I said, thumb sucking, crying, whining and my feeling is that

probably that would even be more upsetting if he had to say it here in an open courtroom. It would be even more enhanced, those kind of behaviors and he wouldn't be able to communicate as——

Q. I couldn't hear what you said?

A. He wouldn't be able to communicate effectively.

Q. And he has these reactions that you describe when you mention Mrs. Craig's, is that correct?

A. When he talks spontaneously about specific events that have happened there, he has these reactions.

Q. Well, would he have these same reactions if he were in a room just with the Judge?

A. I think that he would experience anxiety, but the degree would be less.

Q. His what?

A. I think he would experience anxiety talking about these issues, but the degree of the anxiety would be less and therefore his chances of communicating clearly what happened to him are maximized by diminishing the anxiety or the degree of the anxiety.

Q. Do you believe that if Drew Woodbury would see Mrs. Craig on the street, he would have that same type of [2-18] reaction?

A. That's a difficult question to answer because I know the variables involved in testifying in an open courtroom, but I don't know what you mean when you say see her on the street. I need to know what other variables would be there. Who would the child be with, what would be going on. It would depend on many things.

Q. Well, let's suppose that you were to say to Drew that you were going to take Drew to Mrs. Craig's house or School, would he react adversely?

A. With what purpose—for what purpose?

Q. Just to see her?

A. I think that he would be very anxious. He would ask what for.

Q. Well, besides asking what for, would he have depression, would he cry, would he give some type of adverse reaction?

A. My feeling is that again, I, you know, what would be the purpose. It depends. What would I say to the child. You say, if I were to take Drew to Mrs. Craig's house. What for.

Q. Well, why do you say that his feelings would be different in a setting away from Mrs. Craig as compared to a setting with Mrs. Craig if he doesn't know why he's going to the room to testify?

[2-19] A. Okay, I'm sorry——

Q. All right. If he's taken to a room where Mrs. Craig is not present and he's told that he's going to testify about Mrs. Craig——

A. Right, right, right.

Q. —why would his reaction be any different than if he's told that he's going to be in a room with Mrs. Craig?

A. One of the things that is very difficult for children, especially at this young age, is to tell about very embarrassing, private and traumatic events that happen especially in front of the alleged perpetrator. So, again, that is what is involved in an open courtroom. He would have to say those things in her presence and that's what would enhance his anxiety to a maximum. If he were to meet Mrs. Craig on the street, these are very casual kind of things and the variables are unknown. Where would the child be with, if the child's in anxiety, he can always go away or ask his mother or father to remove him from the situation. But if he's in an open court facing her, telling

the Court what happened, if he has that anxiety he has no resource other than an inability to communicate clearly of what happened and that's what I'm mostly concerned.

Q. Have you ever had an opportunity to compare a child's reaction that has testified in closed circuit as [2-20] compared to confrontation with the person accused?

A. I have not.

Q. You have not. So that you do not know what the reaction would be in one instance as compared to the other, is that correct?

A. No. That's correct.

Q. So your opinion what you believe could possibly happen as——

A. As based on what I've seen Drew done with me in the sessions.

Q. Have there any—to your knowledge, have there been any tests made to compare the reaction of a child in the actual setting with the perpetrator in presence as compared to the perpetrator not in presence?

A. Well, I can tell you what the——

Q. Do you know of any such study or any comparison?

A. No, I don't know of a study. I have seen reports written saying that the degree of anxiety is very high. In fact, I have it in my brief case——

Q. But no such tests have ever been made:

A. But not a test, no.

Q. So that this is only a supposition based upon what they think would happen, is that correct?

A. Based upon—based upon professional experience and basically the training and experience that I have had, [2-21] yes, and that other Psychologists have had.

Q. But to your knowledge and from your studies, no study has ever been made actually comparing the actual reaction of any child in both settings, is that correct Doctor?

A. I don't know of one.

Q. You do not know of one?

A. Right.

MR. KOLODNER: All right. I have no further questions.

MR. WARFIELD: No further questions of this witness Your Honor.

THE COURT: Thank you. You may be excused.

[2-40] • • •

MR. KOLODNER: My understanding is that the Clerk is going to bring to the Court my motion in opposition to the State's motion and my memorandum. I oppose the closed circuit. The closed circuit came about as a result of Section 9-102 of the Court's and Judicial Proceedings Article of the Maryland Annotated Code. I'm aware, as I indicated to your Honor yesterday, that the Court—this very Court has allowed closed circuit in other cases, or at least in another case. My contention is that this is not constitutional. The Statute has not been ruled upon as to whether or not it is constitutional. I believe that it is lacking in two issues. One, as to the First Amendment of the Constitution dealing with the right of the press, and the Sixth Amendment, where the defendant has the right to be confronted by his accuser. I think that this act takes away from the defendant the right of the defendant to [2-41] face the individual, in this case unfortunately small children, who accuse the defendant of the crime. It takes away the truth seeking device, the face to face confrontation that the Constitution guarantees. This Court has within its province the right to rule whether or

not this Statute is constitutional. There are other cases as I understand it on their way to the Court of Appeals to determine whether or not this is constitutional. If, in fact, what we're doing here today is unconstitutional, everything that we do from this point on is for naught. I submit to Your Honor that the video denies the defendant the constitutional right afforded under the Sixth Amendment, that this Court has the right to rule whether or not this is constitutional. I submit that it is unconsitutional [sic] and the use of the closed circuit, the video circuit should be denied.

THE COURT: Do you wish to respond Mr. Warfield?

MR. WARFIELD: Yes Your Honor. May it please the Court. I have provided counsel with a copy of an extensive article on this issue that was in the University of Baltimore Law Forum in the Spring of 1986. I have a copy that I would like to submit to the Court and ask the Court to read it at the Court's convenience. Essentially, Your Honor, I would like to adopt the position without extensive argument here, I would like to adopt the position [2-42] of the writer of the particular aritcle [sic] as it relates to this issue and as I've stated the issue itself is specifically addressed. Obviously and very clearly we're dealing with a new Statute here which has not been ruled upon by our Court's [sic] and I believe counsel is correct in stating, although I don't know the exact status of the cases, but there are cases from Anne Arundel County which are on appeal currently and in which this issue is being raised, so we will have a response at sometime and I don't know when and I can't give the Court any indication of that at this point, but we will have a specific ruling by the Court of Special Appeals or perhaps even the Court of Appeals concerning the constitutionality of the Statute under question.

The essence of the confrontation right as ruled in other jurisdictions, and there's a lot of analysis in this

article concerning how other jurisdictions have dealt with this issue, which has been raised by Court's [sic] of other jurisdiction, dealt specifically with by those courts and constitutionality has been found in other jurisdictions and the analysis basically goes to the point of whether—of the aspect of confrontation really involves the ability to cross-examine the witness and that is the essence of the confrontation right and the analysis in this article points out that that is very carefully and scrupulously maintained under our Statute and that it is because of that and because [2-43] the ability of the defendant is never impaired to any degree whatsoever under our Statute, that the confrontation right while technically perhaps being denied as a practical matter is not being denied, that the defendant has a full and absolute right to confront the witness via cross-examination and that that is maintained, and that that being the essence of the confrontation right, can, in fact yield to some degree to other considerations in terms of permitting the testimony of children and that there are other—there's a balancing test which can come in there and that, again, has been ruled on in other jurisdictions. So Your Honor, I would urge Your Honor to read the article. As I stated I have provided a copy to counsel. I do not deny this Court's right and ability to rule on the unconstitutionality. I would urge the Court to, on the basis of the authority which I have cited in the adoption of that particular argument to in fact rule the Statute constitutional and to permit us to go forward. Obviously, should the Court of Appeals or Court of Special Appeals rule to the contrary sometime during the course of our proceedings, we will be required to abide by that decision and, of course, that will affect us all at that particular point. But I would urge the Court to rule that the Statute is constitutional. I think that the confrontation right is essentially intact in this instance and that the Statute in fact does not impair [2-44] the underlying rationale of the confrontation clause and that is of a right to full and

complete ability to cross-examine and question the witnesses against an individual. So on the basis of those arguments and the arguments that I've just put forward, I would ask the Court to find that the Statute is in fact constitutional and permit us to go forward and depending on the Court's ruling, ultimately, as to the use in each individual case. Thank you Your Honor.

THE COURT: Would you have anything further you would care to add Mr. Kolodner?

MR. KOLODNER: No, that's all.

THE COURT: Well gentlemen, let me review the Law Review Article. I'd like to see the authorities referred to by Mr. Kolodner in his motion that he filed with the Clerk concerning this very issue, I take it.

MR. KOLODNER: Yes sir, on this issue.

THE COURT: Hopefully maybe sometime today I can rule on the issue.

MR. WARFIELD: As I said Your Honor, we have one further witness on the practical aspect of this matter at one o'clock and that will conclude our entire presentation as it concerns this matter.

[2-59] • • •

THE COURT: I think it's understood that this Court is asked to rule upon the appropriateness of certain named children testifying by way of closed circuit t.v.

MR. KOLODNER: That's correct.

MR. WARFIELD: Fine and I——

THE COURT: If the need arises for the Court to rule on whether its [sic] appropriate for other children to do so, that's subject to another evidentiary hearing.

MR. WARFIELD: Very good and that's—as long as that's understood at this point that we're not precluded

from doing that at a future time, that would satisfy the State.

[2-60] MR. KOLODNER: And to follow that up, I think you're referring to the Flynn case, is that correct?

MR. WARFIELD: The Flynn case is one and as I stated there may be witnesses, other children, who we would propose as witnesses in this case or other cases who would be the subject of the closed circuit television as well and at the appropriate time, if that in fact arises, as I said if we could have an opportunity to be heard on that we would appreciate it.

MR. KOLODNER: I just did pick up the papers in the Flynn case, the arraignment is set for February the 10th and I see no problem at anytime if the State wishes to put testimony in on that particular case, that we could do it at anytime that we're here for any motion or for any reason that we're here. I don't think I would need any particular advance notice for that, that we could just do it today if you had someone here to——

MR. WARFIELD: I don't have the witness here. The witness was here yesterday, but——

MR. KOLODNER: Yeah, but the point I'm making is that I don't think that advance notice has to really be given.

MR. WARFIELD: With that in mind and in view of the fact that we have argued on the constitutionality, I would now, Your Honor, from the practical aspect move that in each and every case that we've presented, in other words [2-61] each and every named individual, that we have laid the foundation and satisfied the predicate set forth in the statute which would enable the Court to find that in each and every case that closed circuit television testimony by each of these children is appropriate and is in fact required, really, under the statute and I would ask the Court to find in each and every case that there is a

basis for the decision to allow it pursuant to the statute, that there has been a need shown, there has been testimony in each case that would establish that the child in each and every case would be under such emotional distress that they would be unable to communicate rasonably [sic] in the courtroom and therefore that it would be entirely appropriate and requisite for this procedure to be applied in this case. I might also point out to the Court that Lieutenant Pruitt from the Sheriff's Department who is in the courtroom right now, and this is more on a practical level, is familiar with the operation of the procedures involved, has in fact done the procedures involved, has the equipment and would as a practical matter take care of setting the equipment up and handle the matter from that aspect, so there is a support aspect to it above and beyond the decision to conduct it, that we have the ability to do it with a minimum intrusion on the court and that it can be set up and has been set up in the past for other cases. So [2-62] should the Court rule in our favor in this regard, we have the capacity to set that up and of course Lieutenant Pruitt is available to the Court for any questions as far as the practical application is concerned. With that in mind I would then ask the Court to find in our favor.

THE COURT: Mr. Kolodner, would you like to comment.

MR. KOLODNER: I merely repeat what I had said before and there's no point in repetition, if it please, but we ask that it not be used, that we run the risk of having the Court of Appeals rule that all this proceeding is for naught and it can be decided at this time that this statute is unconstitutional.

THE COURT: Counsel I read—I had read a couple of days ago the Law Review article only because it was one of the few things I could find on the statute, but I reread it during the lunch hour. When I say the Law Review article I'm talking with reference to an article in

the University of Baltimore, School of Law, Law Forum from the Spring of '86 concerning the use of close circuit television and to some extent it addresses the constitutional issues that are raised by the defendant in this case. I would agree that if this—the Court believed upon its evaluation and study of the statute that it was unconstitutional, it would be totally inappro- [2-63] priate for me to say, well I'm just not going to rule on that issue because its [sic] before the Court of Appeals or the Court of Special Appeals. It seems to me that it is appropriate for this Court to rule on that issue. I don't find the statute to be unconstitutional. When I say the statute I'm referring to Section 9-102 of the Court's and Judicial Proceedings Article providing for closed circuit television. The argument of the defendant in the case went to two issues, as I recall them. One that it violated the First Amendment. I assume counsel was referring to the First Amendment protection provided or afforded the right of the public and the press to have access to trials. I think that very issue is addressed in the Law Review article and I think the observations of the writer are valid. Let me see if I can put my finger on it. The writer of the article said;

> "That under the Maryland Statute the access—the only access to the room where the child is testifying is limited. The courtroom is still open to the press and the public and obviously the press and the public can see and can hear what the witness says and what the alleged victim testifies [2-64] to."

So I don't find that it's violative of any First Amendment rights, and I guess the thrust of the objection of the defendant is that it goes to the violations of right of confrontation guaranteed by constitutional protections. The statute does, I agree, take away the right of the defendant to be face to face with his or her accuser, but again as I understand the procedure outlined by the legislature, the defendant's counsel is present. The defendant's counsel has

the right to observe and see the witness. There's the right of cross-examination afforded the defendant and I think the State's right when he says the essence of the right of confrontation is the right to question or cross-examine and that's provided by the statute. The witness as I see it is in the presence of counsel for the defendant. The question's spontaneous. The trier of fact, the jury, can see the witness, can hear the responses, can judge the demeanor of the witness. I don't find there's any violation of—of the right of confrontation. I don't believe that the statute as it exists violates the defendant's right of confrontation under the Sixth Amendment. So I find that the statute is constitutional and then the issue as I see it then is whether the State in this present case, whether it's appropriate to provde that the testimony of certain of [2-65] these individuals proceed by way of closed circuit television and the issue, I guess, the concrete issue is whether the State should be permitted to present the testimony of the certain named children who have been referred to in the evidence who are alleged victims in the cases against Sandra Craig and Jamal Craig by way of closed circuit television consistent with the procedures set forth in Section 9-102. There's been evidence presented and based upon the evidence presented I find that the testimony of each of these children in a courtroom will result in each child suffering serious emotional distress and such that each of these children cannot reasonably communicate and accordingly I believe there's a need and its [sic] appropriate to direct that the testimony of these children be provided by way of closed circuit television consistent with the provisions of Section 9-102 assuming that the child's deemed to be competent to testify and the child's testimony is relevant and of course not otherwise objectionable and assuming those two predicates are met, that is that the child is determined to be competent and that the subject matter of the child's testimony is relevant and not otherwise objectionable, each of the children referred to

in the evidence will be permitted to testify by means of closed circuit television consistent with the procedure set forth in Section 9-102.

[2-66] MR. WARFIELD: A point of clarification, Your Honor, if the Court pleases. There is—the question is—the Court has raised that leads us to this point and that is on the issue of competency as it applies to each witness. Again in conjunction with the Court's order, we would ask that those circumstances also be subject to the same ruling by the Court and that the competency——

THE COURT: To the extent that in order to determine the competency of a witness it's necessary to question the witness, the Court would envision that that interrogation of the child witness would be done by means of closed circuit television.

MR. WARFIELD: I believe that you, Your Honor, if you're the Judge that's going to be doing the questioning will be face to face with the child and I'm saying this by virtue of past experience in the other cases that we've utilized this that your confrontation or your interrogation of the child will then be broadcast back to the defense—to the defendant at that particular time and made—obviously made a part of the record and the observations can be made at that time and I would ask the Court to and I believe the Court already has indicated that that would be the process that would be utilized, is that correct.

THE COURT: It would seem to me that any questioning of the witness—of these specific children on the very [2-67] issue of competency to the extent that the Court would have to interrogate the witness, it would seem to me that's one of the criteria, in fact the only criteria the Court should consider in determining competency, it would—the Court would do so in this fashion.

MR WARFIELD: All right Your Honor. Would the Court have any questions of Lieutenant Pruitt just as a

practical matter at this time or I'm pointing it out for this reason. Due to the way that the courtroom is set up here we can make one or two monitors available. For example if it would be deemed appropriate that the defendant would have their own monitor as opposed to the jury have a monitor, that can be done or a single monitor can be set up. It's just a matter of logistics in terms of——

THE COURT: We've had video taped depositions in this courtroom and we just put a monitor right in front of me or on the witness stand and it's been my experience that everybody can see what's going on.

MR. WARFIELD: All right, I'm just saying that we have the capacity to modify these matters. We have the equipment and the ability to be able to do that to accommodate—perhaps again, no criticism intended of the way the courtroom is set up, but in order to——

THE COURT: The record is silent as to how this [2-68] courtroom is designed. Maybe you both want to clarify that.

MR. WARFIELD: Well it—the—for the record purposes, the jury is opposite the Judge in a semi-circular fashion. Defense attorney is on one side and of course the Judge is facing and just for being able to make an observation direct, which I think is important in this case, that the—that the children be very clearly focused in the camera and that the jury and that obviously even the defense and the Judge have an opportunity to see directly what is depicted on the screen. That it be in such a fashion that everybody has a clear view and if it entails more than one we can accommodate that, I'm saying from a practical standpoint. But these are practical things that can be taken care of at anytime.

THE COURT: Well it seems to me that the only requirement is that procedurally the closed circuit t.v. proceed as required by the statute and how that's handled

has to be consistent with the abilitiy of the jurors, the defendant to see what's being said and hear what's being said. I don't think it's that difficult. I guess the location of where this closed circuit takes place is subject to discussion of counsel. One—I assume it might be one possibility would be that counsel and the child were in my chambers or somewhere—I don't know where else they'd be [2-69] in this courtroom.

MR. WARFIELD: I believe that's what we would propose.

THE COURT: I assume that's a logical place. There maybe other places and I assume that once the logistics of the closed circuit are agreed upon, they can be set forth in the record and any objection to the mechanics of how it would work can be noted for the record by counsel for the parties.

MR. WARFIELD: Very well Your Honor.

• • •

[Certificate of Court Reporter omitted in printing]

[1-1]

IN THE CIRCUIT COURT
FOR HOWARD COUNTY, MARYLAND

Criminal Case No. 15625

STATE OF MARYLAND

VS.

SANDRA A. CRAIG

Defendant

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDING
(Trial on the Merits)
VOLUME I of XII

Howard County, Maryland

March 16, 1987

BEFORE:

HONORABLE RAYMOND J. KANE, JR.
(and a jury)

APPEARANCES:

For the State:
A. G. Warfield, Esquire
M. C. O'Donnell, Esquire

For the Defense:
F. Kolodner, Esquire
J. Hirt, Esquire

Janet Falkenstine - Court Reporter
Circuit Court for Howard County
8360 Court Avenue-Room 435
Ellicott City, Maryland 21043

[1-36] • • •

MR. KOLODNER: At this time then I would like to make my motion or renew my motion that, although the court has already ruled on this motion, that this procedure not be used using the video, closed circuit television, that I renew my motion on the grounds that the defendant, by the use of this procedure is being denied her rights under the sixth amendment of the constitution of the United States, is not being confronted by the accuser and that the State at this time could change this procedure and avoid the possibility that this law be declared unconstitutional which the defense firmly believes is unconstitutional and that the case could be conducted in the ordinary manner in having the child testify [1-37] in the courtroom. And for these reasons I would renew my motion that . . . as to the use of the closed circuit television.

THE COURT: The State would propose to call Brooke Etze as its first witness?

MS. O'DONNELL: That's correct, your Honor.

THE COURT: Alright. I'm going to overrule the objections that counsel made to the appropriateness of this court permitting that child to testify consistent with the statute for the reasons I indicated previously. I would have to speak with this child in chambers in order to satisfy myself that the child is competent. Can the child be brought here in a few minutes—the child is in your office or something?

MS. O'DONNELL: Yes, Your Honor, she's in my office waiting for directions to be brought over here.

THE COURT: Alright. Assuming we can conclude that hurdle, that is, in a short period of time, at least make a determination as to whether or not the child's competent, is it likely we can present some testimony from the child this morning.

MS. O'DONNELL: Yes, Your Honor, if that's your wish.

THE COURT: Well, I'm just trying to think . . . lunch hour . . . I'm going to send the jury back to the jury room and possibly we can get them before lunch if the child is ruled competent. Alright, I would propose at this time to [1-38] excuse the jury and then speak with the child in chambers in the presence of counsel concerning determination of whether or not the child is competent. Obviously after I conclude questioning the child, if counsel want to be heard concerning whether or not it is appropriate for me to determine the child as competent or not, we'll come back here and hear from you on the record on that issue. Alright, let me just tell the jury.

(COUNSEL RETURNED TO THE TRIAL TABLES AND THE FOLLOWING ENSUED:)

THE COURT: Ladies and gentlemen, there are going to come periods or occasions during the course of the trial that I'm going to be required to consider certain matters from counsel, arguments, perhaps even evidentiary matters out of your presence, that is, you'll not be present when certain proceedings take place. This is one of those stages at this time. I'm going to ask you to return to the jury room. We shouldn't be too lengthy. As soon as I conclude we'll get you back here. Would you just recess to the jury room please.

(JURORS LEAVE COURTROOM)

THE COURT: Would counsel and perhaps Mrs. Craig could approach the bench also, please.

(COUNSEL APPROACHED THE BENCH AND THE FOLLOWING ENSUED:)

THE COURT: I would propose at this time to question the child in my chambers. Is . . . is . . . Mr. Kolodner, I take it, [1-39] going to be present in chambers with me?

MR. KOLODNER: That's my understanding of this procedure.

THE COURT: Sure. Mr. Hurt would remain here with Miss Craig?

MR. KOLODNER: Yes, that's right. As is . . . as I understand it only one counsel . . .

MR. WARFIELD: I'll be here in the courtroom.

MR. KOLODNER: . . . is allowed . . .

THE COURT: And Mrs. Craig and Mr. Hurt understand how they can communicate with you in my chambers?

MR. KOLODNER: My understanding . . . my understanding is that the telephone will be left open . . .

THE COURT: Yes.

MR. KOLODNER: . . . for you - Miss Craig, do you understand this?

MRS. CRAIG: Yes.

MR. KOLODNER: That if you want to ask me anything or you want to tell me anything or advise me of anything, that you merely talk on that telephone and that no one else is permitted to listen to that conversation. That is to be closed between you . . .

THE COURT: Matter of fact, it is closed.

MR. KOLODNER: . . . and that office. Sorry.

THE COURT: The phone system is closed so that once [1-40] that receiver is up, no one else on the switchboard can talk. I mean, that's the way the system works.

MR. WARFIELD: (Inaudible)

THE COURT: Any questions as to . . .

MR. KOLODNER: Do you understand that, Mrs. Craig?

MRS. CRAIG: I was afraid if I wanted to speak to you . . .

MR. KOLODNER: Alright, if you (inaudible) and that will be fine I'll understand that you want to say something.

THE COURT: Alright, I would propose then to recess. We'll recess briefly.

(RECESS)

(COMPETENCY QUALIFICATION OF BROOKE ETZE BY THE COURT IN CHAMBERS VIA VIDEO TAPE)

COMPETENCY QUALIFICATION

BY THE COURT:

Q. Do they call you Brooke? Do your friends call you Brooke?

A. Yes.

Q. How old are you Brooke?

A. Seven.

Q. Are you in school?

A. Yes.

Q. Do you know where you are today?

A. No audible response.

[1-41] Q. Where are you?

A. In the court.

Q. In the court house. How'd you get here today? Did somebody bring you here?

A. Mrs. Miles.

Q. Mrs. Miles?

A. Um huh.

Q. You're in the first grade at Clarksville. Who is your teacher?

A. Miss Higgins.

Q. Miss Higgins?

A. Um huh.

Q. And, do you have any brothers and sisters?

A. No.

Q. Okay. What . . . what do you learn in Miss Higgins' class? What subjects do you teach, what do you?

A. We learn handwriting, and we're learning numbers.

Q. You learned some numbers?

A. (No oral response)

Q. Do you learn some hand . . . can you write your name?

A. (No audible oral response)

Q. Do you know your ABC's?

A. Yes.

Q. You do. Tell me the ABC's.

A. A,B,C,D,E,F,G,H,I,J,K,L,M,N,O,P,Q,R,S,T,U,V, W,X,Z

[1-42] Q. Very good. And you say you learn handwriting. Do you do cursive writing or do you write the letters out or how do you write? Can you write your name?

A. Yes, but not in cursive.

Q. Alright, you don't write in cursive yet?

A. No.

Q. Do you know your numbers?

A. Yes.

Q. What numbers do you know?

A. 1-2-3-4-5-6-7-8-9-10-11-12-13-14-15-16-17-18-19-20.

Q. You went all the way up to twenty, one to twenty. Do you know how to add . . . and add and take away?

A. Um huh.

Q. Do you know things like that?

A. Um huh.

Q. Do you know how . . . tell me how to add or tell me take numbers. How do you do that? Do you know like two plus two.

A. Four.

Q. Very good.

A. (Oral response inaudible)

Q. Okay. Do you know colors?

A. Yes.

Q. What color is this robe that I'm wearing?

A. Black.

Q. Um huh. And how about the lady behind you, what
[1-43] color dress does she have on?

A. Red.

Q. Alright. You live with your mother and father?

A. Yes.

Q. Yes?

A. Yes.

Q. What is your mother's name?

A. Chris Etze.

Q. Alright, and how about your dad?

A. Tony Etze.

Q. Where did you go to school before you started at Clarksville, Brooke?

A. Mrs. Craig's.

Q. Do you remember going to school at Mrs. Craig's school?

A. Yes.

THE SHERIFF: Excuse me, Your Honor, she's going to have to speak up some. We can hardly hear her.

THE COURT: Okay.

Q. You are going to have to speak a little louder, okay. Can we bring the mike closer to her or something like that?

THE SHERIFF: That's what I'm going to do.

BY THE COURT:

Q. You say you remember when you went to Mrs. Craig's school?

[1-44] A. Yes.

Q. Alright. And do you know that we're going to ask you some questions today about what happened at Mrs. Craig's school, do you know that?

A. Yes.

Q. Alright. And will you answer those questions for us?

A. Yes.

Q. Will you tell us what you remember?

A. Yes.

Q. Alright. Did anybody tell you what to tell me or what to say?

A. Un un .

Q. When . . . when . . . if I ask you a question or if the other people behind you later on ask you questions, will you tell us what you remember?

A. Yes.

Q. And you won't tell us what somebody told you to say, will you?

A. No.

Q. Did anyone tell you to say bad things about Mrs. Craig or anything like that?

A. No.

Q. Do you know the difference between right and wrong, Brooke?

[1-45] A. Yes.

Q. Tell me . . . tell me what the difference is, do you know? What's wrong?

A. What's wrong is to tell a lie.

Q. Okay. Do you know the difference between telling the truth and telling a lie?

A. Yes.

Q. What's the difference?

A. The truth depends on what you say, is it true or not true.

Q. Is it wrong to tell a lie?

A. Yes.

Q. Well if I told you . . . if I told you that I was a lady, would I be telling you the truth?

A. No.

Q. Why?

A. Because you're not a lady . . .

Q. Alright.

A. . . . you're a man.

Q. Okay. And if I told you that . . . that you were a school teacher, would I be telling the truth?

A. No.

Q. Why?

A. Because I'm not a school teacher.

Q. Alright. So you say it's wrong to tell a lie, is [1-46] that right?

A. Yes.

Q. Why is it wrong? Will something happen to you if you don't tell the truth?

A. Yes.

Q. What will happen?

A. Well sometimes I would get in trouble.

Q. How would you get in trouble?

A. Sent up to my bedroom.

Q. If . . . if your mom or dad . . . if you told a lie and your mom and dad found out about it, what would happen to you?

A. They would probably ground me for a year.

Q. Ground you for a year? What do you mean by grounding you?

A. They would make me lose something.

Q. Like couldn't watch TV or something like that?

A. Yes.

Q. Alright.

A. I would have to do it.

Q. Okay. Do you understand that when we ask you questions here today and when the other two people ask you questions later on, that you have to tell the truth?

A. Yes.

Q. Alright. Will you tell the truth?

[1-47] A. Yes.

Q. Alright. And do you understand that you have to tell the . . . tell us the truth, you can't lie to us, do you understand that?

A. Yes.

Q. Alright.

THE COURT: Alright, counsel, I would propose to perhaps hear from you outside if you like concerning the issue of this child testifying. Perhaps we could go outside and hear from you at bench. Brooke, I'm going to step outside into the courtroom. You can remain here for a few minutes with the man who's operating this machine, alright.

A. Okay.

THE COURT: Thank you. I'll be with you in a few minutes. And then perhaps after I'm finished I may stay out there or I may come back, so it might be that I stay out there and the other people will talk to you in here, do you understand that?

A. (No audible oral response)

THE COURT: Okay. I'll be with you in a few minutes.

(JUDGE PROCEEDS TO COURTROOM)

(MONITORS SWITCHED)

THE COURT: Have a seat please.

(COUNSEL APPROACHED THE BENCH AND THE FOLLOWING ENSUED:)

THE COURT: Would you like Mrs. Craig up here?

[1-48] MR. KOLODNER: Yes, I think so.

THE COURT: Miss Craig, would you come up please?

(MRS. CRAIG APPROACHES THE BENCH)

MR. KOLODNER: The defendant has informed me . . . said that she could only hear part of what the child was saying and could not hear the rest, is that correct?

MRS. CRAIG: Yes, her voice kind of drops down.

MR. KOLODNER: And as to the competency, I think I would like to have it explored more as to who has talked to her such as the therapist and if the therapist told her to say anything in this courtroom today.

THE COURT: Does counsel want to respond?

MS. O'DONNELL: Your Honor, I would respond on behalf of the State. I think that the Judge's voir dire of Brooke Etze regarding her competency to stand trial is complete and satisfactory and sufficient. The Court . . .

THE COURT: Ladies and gentlemen, you'll have to help us out please, please. Surprising, they can hear what you're saying, but they can't hear what's going on up here. Please, quiet.

MS. O'DONNELL: Brooke indicated in response to your question that she knew why she was here . . . where she was and that she knew on what she was here for today. She indicated that she understood the difference between telling the truth and telling a lie. She indicated

that she under- [1-49] stood the importance of telling the truth. She indicated she understood that . . . that . . . the consequences of not telling the truth or the consequences of telling a lie by giving answers to the effect . . . to the effect that she would be punished if she didn't tell the truth. After your question in that regard she . . . again, in response to a number of your questions that she would tell the truth, that she understood to tell the truth. She was asked specifically whether she was in court for the purposes of saying things that had happened to her after she became . . . that she did remember on Mrs. Craig's school and she indicated that she was. Your Honor, any other questions beyond this are not questions that go to the threshhold question of the competency of a witness to testify.

THE COURT: Well, I understand counsel's objection or concern. It seems to me that's a matter that perhaps could be raised by way of cross examination. I'm satisfied, based upon my questioning the witness that the witness is going to tell us what she recalls and not based on what someone else dictated to her to testify. And it seems to me that goes . . . that's the issue for competency. She obviously has the ability to . . . to communicate with me and with counsel. She understands questions. She can formulate and articulate answers. I'm satisfied by my . . . I should say that for the record, I am wearing a black robe and counsel has a red dress on, or [1-50] business suit. That's not Mr. Kolodner's red business suit. Miss O'Donnell has a red business suit on. (Very noisy) Some static drowned out the audio. In fact nothing was . . . said at that time. She certainly has based on my questioning of her, satisfied me that she has the ability to observe and remember things about what she's testifying and she understands her obligation to speak the truth. So I overrule the objection of the defendant. I'm satisfied that this witness is competent and will permit her to testify. Now, mechanically how we do that is . . . I assume counsel are

going to go back to the . . . first of all, sheriff, I can't see this monitor.

THE SHERIFF: I'll turn it around.

THE COURT: Thank you. I assume the defendant and Mr. Hurt can see that monitor. Perhaps even the one in front of us. Certainly the jury will be able to see the monitor in front of us.

THE SHERIFF: She doesn't . . . we can't hear her very clearly.

THE COURT: Well, then we're just going to . . . any time you can't hear, I assume counsel's going to have to bring it to my attention or I can just push a button and talk over everyone and say you can't be heard. Obviously if I can't hear, the jurors can't hear, the defendant can't hear, then we have to . . . if you can't hear, just let me know and I'll . . . I'll [1-51] instruct . . . by just pushing this button . . . let me just see if I can reach the . . . now, I'm going to be heard if I push this. Am I going to be heard on this monitor. May I inquire, if counsel want to approach the bench, then, of course, they can . . . the sheriff can just pull the plug in there and let's proceed and see how we do.

MS. O'DONNELL: Your Honor, for the record . . .

THE COURT: Yes.

MS. O'DONNELL: . . . pursuant to our discussion in chambers this morning prior to commencing this case, I asked permission to be able to . . . in the event that Mr. Kolodner and I must leave the room in order to meet with you for the purposes of a bench conference, give brief instructions to Brooke Etze, the witness, regarding the fact that she is to stay in the room, that we will be back so that she is not left without any kind of idea as to where we are going and if we're coming back.

THE COURT: Mr. Clerk, tell those folks to keep quiet or they're going to have to leave.

THE CLERK: Ladies and gentlemen, keep your voices down.

THE COURT: Ladies and gentlemen, please, this is a public trial, everyone has the right to be here, but the proceedings . . . you know, we're having enough trouble with the video equipment, the court reporter's having enough time [1-52] talking to me, I don't think we're going to have any trouble with the equipment, but we haven't even gotten to that stage 'cause the court reporter can just hear you talking above me, but they can't hear what's being said up here. It's . . . believe it or not, it's more important to hear what the attorneys say than what you have to say. So, please, if you want to talk, whisper. If need be, just step outside. Pardon me.

MS. O'DONNELL: That's the State's only comment, Your Honor.

THE COURT: It's understood that if counsel wish to approach the bench that Miss O'Donnell may state that the . . . to the young girl that, you know, that she has to stay there. She may wander off in my chambers or something.

MR. KOLODNER: No objection to that.

THE COURT: Sure. Let's proceed. May I inquire of counsel, do you believe it appropriate for the child to be given an oath?

MS. O'DONNELL: Your Honor, I don't think it would be inappropriate to give her an oath as every other witness in the case.

THE COURT: I'm going to instruct the clerk, once you're assembled, to walk into the room and to just ask the child if she will agree to testify truthfully and to speak the truth in the course of . . . just modify . . . yes sir.

[1-53] MR. WARFIELD: Just . . . can we make sure Lieutenant Pruitt gets this tape (inaudible)

THE COURT: Ask Lieutenant Pruitt to come in.

MR. WARFIELD: . . . it was recorded (inaudible)

MR. KOLODNER: When we go back maybe we can tell him to come out so the child is not left alone.

THE COURT: You go in and tell him to come out. You may return to your seat, yes ma'm.

(PAUSE IN PROCEEDINGS)

THE COURT: Apparently there's some concern that the audio portion of the tape is not . . .

SHERIFF: Video, Your Honor. The video . . . the camera will cut off after about five minutes without recording. That's what's happening.

THE COURT: Have the jury brought in somebody. Sheriff, ask the jurors to be brought in.

(JURORS ENTER COURTROOM)

THE COURT: Counsel, I'm going to instruct the clerk to swear the witness in. Are there any preliminary matters before I do so?

THE SHERIFF: I don't believe counsel can communicate. Just haven't found him.

THE COURT: Well, maybe he hasn't picked up the phone so . . . Sheriff, if you're ready to proceed you can do so. I will instruct the clerk to swear in the witness.

[1-54] MR. KOLODNER: If it please the court, co-counsel . . .

THE COURT: Just a minute. Want to approach the bench, please? Counsel approach the bench, please.

(COUNSEL APPROACHED THE BENCH AND THE FOLLOWING ENSUED:)

MR. KOLODNER: Counsel says he's been trying to reach me on the phone and . . . many times and has not been able to reach me. I've been in there saying, I'm here, does anyone want to say anything to me, but I haven't been able to get any response.

THE COURT: Have you pushed the button down?

MR. KOLODNER: I didn't know . . . I didn't push any button.

THE COURT: Sorry about that, but you're supposed to push the button.

MS. O'DONNELL: I'm not aware. Your Honor, I would suggest that perhaps we excuse the jury and work out the wrinkles and . . .

MR. KOLODNER: That's ironic. I didn't know there was a button. Maybe I did something wrong because the button . . .

MS. O'DONNELL: (Inaudible)

THE COURT: Let's find out from the Lieutenant how long we're going to be. He told me it would just be a minute or two.

MS. O'DONNELL: Your Honor, I have a suggestion if you excuse the jury. If satisfied with defense counsel's . . . [1-55] is comfortable with the . . .

MR. KOLODNER: It's just that I think the child is getting a little restless from my observation. I see her keep moving . . . kicking her legs, it's just an observation.

THE COURT: Is anybody with the child?

MR. KOLODNER: Yes sir.

MS. O'DONNELL: I would just ask (inaudible)

THE COURT: Sheriff, would you just come here a minute, please? I'm not trying to take you to task or

anything. Is it going to take a little while - are you having a problem with that?

THE SHERIFF: Yes sir.

THE COURT: Okay, probably on this note we might break for lunch, okay? Do you want to do that. And apparently counsel's having problems communicating with his colleague at the trial table on the . . . my telephone.

THE SHERIFF: Do you have any problems with me putting another telephone in there?

THE COURT: I . . . you can put anything in there.

MR. KOLODNER: Well, was I supposed to push anything?

THE COURT: Was he to push the button down or something?

THE SHERIFF: No, you should just talk.

[1-56] MR. KOLODNER: I was saying . . .

THE SHERIFF: Did you hang it up?

MR. KOLODNER: Have it hung up, no. Well, you were in there when I kept saying, I'm on here, is anyone talking.

THE COURT: Let me have the jurors back at one thirty, okay.

THE SHERIFF: Sorry, about this, Your Honor. Yesterday it worked fine, no problems at all.

(COUNSEL RETURNED TO THE TRIAL TABLES AND THE FOLLOWING ENSUED:)

THE COURT: Ladies and gentlemen, we're having some problems apparently tying into the phone line and my office so, probably it's going to take us just a few minutes to resolve those. It might be appropriate just to send you all to lunch. Come back here at one thirty and

we'll reconvene at that time. Again, during this recess and any other recess, you're not to discuss the case with yourselves, you're not to discuss it with the press, with litigants, with concerned citizens, with anyone. If there is any violation of that come see me. We'll recess until one thirty.

(LUNCHEON RECESS)

(AUDIO TEST FROM JUDGE'S CHAMBERS)

(AFTER RECESS)

THE COURT: Have a seat please. As [sic] the jurors in, [1-57] please. Hold the jurors, Sheriff. Want to approach the bench.

THE SHERIFF: We still seem to be having difficulty with this phone system.

THE COURT: Can we proceed sheriff. Ask the jurors in.

(JURORS ENTER COURTROOM)

MR. WARFIELD: Could the record just reflect verbally what the set up is here?

THE COURT: Approach the bench, please.

(COUNSEL APPROACHED THE BENCH AND THE FOLLOWING ENSUED:)

THE COURT: Again, we . . per where we were at the time we recessed, Mr. Hurt is in the courtroom with the defendant, Mr. Warfield is in the courtroom. In my chambers which I just left are Mr. Kolodner for the defendant and Miss O'Donnell for the State, a technican [sic] operating the equipment and a witness who has just taken the witness stand.

MR. WARFIELD: I think it should further be pointed out that there is two-way communication between . . .

THE COURT: There still is communication between counsel, Mr. Hurt and Mr. Kolodner in my office.

MR. WARFIELD: And that the defendant is capable of seeing the monitor and observing all the . . .

THE COURT: There are two monitors set up in the courtroom, one is in the presence . . . the jurors can . . .

[1-58] MS. O'DONNELL: For the record, this is Kate O'Donnell speaking. It is approximately ten minutes until two o'clock on the afternoon of Monday, March the 16th of 1986 . . .

MR. WARFIELD: '87.

MS. O'DONNELL: . . . excuse me, '87. Present in the courtroom is Brooke Etze, a witness in the case of State of Maryland versus Sandra Craig. Also in the room is Fred Kolodner, counsel for the defendant, Kate O'Donnell, Assistant State's Attorney, Lieutenant Pruitt, acting as counter-technician, and Mr. Merson, clerk of the court.

BROOKE ETZE

a witness, called on behalf of the State, having previously been sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. O'DONNELL:

Q. Brooke you're going to have to talk loud enough for all of the people in this room to hear you, okay.

A. Okay.

Q. And loud enough so that your voice is properly recorded on the recording machine that we're using to record everything that you say in this room, okay?

A. Okay.

Q. You've just been given an oath from Mr. Merson, an oath is a promise to tell the truth. I'm going to ask you [1-59] some questions and then Mr. Kolodner's going to ask you some questions. Do you understand that?

A. Yes.

Q. Do you understand, first of all, Brooke, how important it is to tell the truth?

A. Yes.

Q. What is the difference between telling the truth and telling a lie?

A. It depends on what you say.

Q. What do you mean? What does it mean to tell the truth?

A. It means . . . if you're telling somebody something that . . . if you're telling somebody something and . . . if you're telling somebody something and they just . . .

Q. If I told you that you were wearing a red dress, would I be telling the truth or would I be telling a lie?

A. A lie.

Q. If I said you had blonde curly hair, would I be telling the truth or would I be telling a lie?

A. That's a toughy.

Q. Do you have blonde hair, yellow hair?

A. No.

Q. What color is your hair?

A. Black.

Q. If I told you it was snowing outside today, would I [1-60] telling the truth or would I be telling a lie?

A. A lie.

Q. Is it important to tell the truth?

A. Yes.

Q. What happens to you if you tell a lie and don't tell the truth?

A. Sometimes I get grounded.

Q. What do you mean by getting grounded?

A. I mean . . . it means that you lose something.

Q. Is it like a punishment?

A. Yes.

Q. How do you feel inside if you tell a lie?

A. I feel unhappy.

Q. Do you know how important it is to tell the truth when you come to court?

A. Yes.

Q. How important is that?

A. Well, it's very important.

Q. Did you promise to tell the truth and nothing but the truth?

A. Yes.

Q. Brooke, what is your whole name?

A. Brooke Etze.

Q. What is your middle name?

A. Su Jin.

[1-61] Q. What kind of name is Su Jin?

A. Well, it's sort of a name . . . it means Brooke, my real name.

Q. It means Brooke?

A. Yes.

Q. How old are you Brooke?

A. Six.

Q. And when is your birthday? What day is your birthday?

A. April 11.

Q. And where do you go to school now?

A. I go to Clarksville Elementary.

Q. And what grade are you in?

A. First.

Q. And what is your teacher's name?

A. Miss Higgins.

Q. Is she a nice teacher or a bad teacher?

A. Nice, except when she gets grouchy.

Q. What is your mom and dad's names? What is your mom's name?

A. Chris Etze.

Q. And what is your dad's name?

A. Tony Etze.

Q. And where do you live?

A. Fulton, Maryland, Rainbow Street.

[1-62] Q. And what does your mom do for a living?

A. She teaches.

Q. Where does she teach?

A. That's a toughy.

Q. Do you know or don't you know?

A. I don't know.

Q. What does your dad do for a living?

A. He works for the government.

Q. Where did you go to kindergarten last year?

A. Clarksville Elementary.

Q. And where did you go to sc' ool before you went to kindergarten?

A. Mrs. Craig's.

Q. And where did you go to school while you were in kindergarten besides Clarksville Elementary School?

A. Mrs. Craig's.

Q. So you went to Mrs. Craig's school for two years, yes or no?

A. For a little bit. I'm not sure for that.

Q. Tell me what Mrs. Craig looks like.

A. Well, she has . . . well, she's black.

Q. What color hair does she have?

A. Black hair, curly black hair.

Q. Brooke, what kind of makeup does she wear?

A. She wears eye stuff and she wears cheek stuff and [1-63] she wears outliner for her lips and she wears lipstick.

Q. And what kind of clothes does she wear when she was at her school?

A. A black jacket.

Q. Does she wear dress-up clothes or play clothes?

A. She wears . . . sometimes dress-up clothes but not always.

Q. Did you know whether Mrs. Craig was married or not? Whether she had a husband or not?

A. No.

Q. Do you know or don't you know?

A. I don't know.

Q. What was Mrs. Craig's job at the school?

A. Well, the only thing I can think of is to scare kids.

Q. Was Mrs. Craig nice or bad?

A. Bad.

Q. Was she ever nice?

A. To the parents she was.

Q. Tell Mr. Kolodner and I about the bad things that Mrs. Craig did.

A. Well, she would kick me in my leg.

Q. Would she kick you anywhere else or not?

A. Yes.

Q. Where else would she kick you?

A. In my privates.

[1-64] Q. What do you mean by your privates? Is that a part of your body?

A. Yes.

Q. Would you show me and show Mr. Kolodner by pointing what you mean by your private?

A. Well, up here and down there.

Q. Down between your legs?

A. (No oral response)

Q. Where would Mrs. Craig be and where would you be when she would kick you in your privates?

A. Sometimes upstairs or sometimes in the woods.

Q. Where upstairs?

A. In her office.

Q. Did Mrs. Craig do anything else that was a bad thing?

A. (No audible oral response)

Q. Did she ever touch your private parts with anything else?

A. (no oral respone [sic])

Q. Well, tell me about it.

A. With a stick.

Q. Where did she touch you with a stick?

A. In my private parts.

Q. Would you mind touching to your private parts again so we can see what you're talking about?

A. Here between my legs.

[1-65] Q. How many times did Mrs. Craig touch you with a stick in your private parts?

A. A lot of times.

Q. What did that feel like?

A. It feeled . . . it doesn't feel good.

Q. How did it make you feel?

A. It made me feel strange.

Q. Where in the school would you be and where in the school would Mrs. Craig be when she would touch you with a stick in your private parts?

A. Well, we would be sometimes in the woods and sometimes in her office.

Q. Where would the other kids be when you would be in the woods with Mrs. Craig?

A. Outside.

Q. Where outside?

A. On the playground.

Q. Where would the other kids be when Mrs. Craig was up in her office with you?

A. At nap time.

Q. Where were they taking their naps?

A. She had all sorts of places. Sometimes where the older kids stayed where the big kids class was and in the place where we always played when it was raining.

Q. What other parts of your body did Mrs. Craig touch [1-66] in a bad way?

A. (Unable to understand)

Q. Did she ever touch your head?

A. (No oral response)

Q. What did she do to your head?

A. She hurt it.

Q. How did she hurt it?

A. She kicked me.

Q. Where did that happen, Brooke?

A. Outside and sometimes inside at nap time.

Q. What were the things that Mrs. Craig did that she called spider bites.

MR. KOLODNER: Objection.

THE COURT: Okay, let counsel approach the bench please.

MS. O'DONNELL: Brooke, we're leaving the room for a minute. We'll be right back, okay.

(COUNSEL APPROACHED THE BENCH AND THE FOLLOWING ENSUED:)

THE COURT: The question as I understand it was, what did she do that was spider like . . .

MS. O'DONNELL: What did she do that she called spider bites.

THE COURT: Spider bites. What is the objection, Mr. Kolodner?

MR. KOLODNER: Because of the leading question. The [1-67] child has never said anything about spider bites.

THE COURT: Alright, I'll overrule the objection. Don't lead the witness Miss O'Donnell, but I'll permit the question.

(COUNSEL RETURNED TO THE TRIAL TABLES AND THE FOLLOWING ENSUED:)

BY MS. O'DONNELL:

MS. O'DONNELL: Let the record reflect that counsel for the State and the defense are back in the Judge's chambers with Brooke Etze.

Q. Brooks, you can answer that question that I asked you. What did Mrs. Craig do that she called spider bites?

A. Thumb tacks.

Q. Say that, I didn't hear you.

A. Thumb tacks.

Q. What about thumb tacks?

A. She would say they were spider bites.

Q. And what would she do with those thumb tacks?

A. Well, she would make them look like spider bites.

Q. Tell me in more detail what she did with the thumb tacks.

A. Well, she would make them that were called spider bites.

Q. Where would she make them?

A. In her hand.

[1-68] Q. How would that feel?

A. Uncomfortable.

Q. Keep your voice up Brooke so we can all hear you.

A. Okay.

Q. What kind of rules did Mrs. Craig have at her school?

A. Unfair rules.

Q. What do you mean by unfair rules?

A. Well, she wouldn't play something fair. She would make up her own rules. Like when we were outside playing house, she'd say, I'm going to be the mother and then she said that the mother gets to tell everybody what to do and that wasn't fair because we already had a mother.

Q. What rules did she have for the children?

A. (Unable to understand)

Q. What would be the rule about hurting other kids?

A. The rule would be that you have to do something to them.

Q. Something nice or something bad?

A. Bad.

Q. Brooke, why didn't you go home right away when these things happened and tell your mom and tell your dad?

A. Because I was scared.

Q. Why were you scared? What did Mrs. Craig say to make you scared?

A. Well, she said that my parents wouldn't love me any [1-69] more.

Q. What else did she say to make you scared?

A. She said my parents would get a divorce.

Q. Did she say anything else to make you scared?

A. Yes.

Q. What else did she say to make you scared?

A. She said that she would kill me.

Q. How did that make you feel?

A. Scared.

Q. What names did Mrs. Craig call you?

A. One of the names that I've never heard before.

Q. What was that?

A. Child bitch. It just never appeared to be a name that I've ever heard.

Q. What was that again.

A. Child bitch.

Q. What other names did she call you?

A. Stupid.

Q. Anything else, yes or no?

A. Yes.

Q. What?

A. And dumb.

Q. What was your answer? I didn't hear you, Brooke.

A. And dumb.

Q. Dumb?

[1-70] A. Um huh.

Q. How do those names make you feel?

A. I don't know. Just made me feel different.

Q. How did Mrs. Craig treat animals?

A. Bad.

Q. Tell Mr. Kolodner and I about how she treated animals.

A. Bad.

Q. What animals did you see at Mrs. Craig's school?

A. Possum, rabbit and . . . now, what was that other thing.

Q. Tell me about the rabbit.

A. Well she . . . well she took a hammer and she hurt the bunny. She put the thing on it.

Q. What do you mean, she put the thing on it? What do you mean by that? Explain that to me a little bit better.

A. Well, she put . . . whatever that thing is called on the . . . on the rabbit.

Q. And what happened to the rabbit?

A. And it just couldn't breathe anymore.

Q. Who saw that happen to the rabbit?

A. The kids.

Q. Where was that rabbit at the school?

A. Outside.

Q. Where outside? Do you remember?

A. Uh uh.

[1-71] Q. Tell Mr. Kolodner and I about the possum.

A. There was a possum in the trash can and Mrs. Craig made it dizzy sort of.

Q. What do you mean? Explain to us by what you mean by made it dizzy sort of. Explain that better, Brooke.

A. Well, she just rolled it around in the trash can.

Q. Who watched that?

A. The kids.

Q. How did that make you feel inside?

A. Like the possum would.

Q. Brooke, why did you finally tell about what happened in Mrs. Craig's school? Explain that to us, would you?

A. Well because it just appeared to me that if I kept this inside I just . . . it just would hurt me more.

Q. And who did you tell?

A. My mom and my dad, but lastly my mom.

Q. And after you told your mom and dad you told some other people too, didn't you?

A. I told my grandma and that's mostly who I told. I told Mary, I told Joe.

Q. Who is Mary?

A. Mary Burke.

Q. You told police officer Beth,didn't you?

A. Yeah, I told her.

Q. And you told me, didn't you?

[1-72] A. Yes.

MS. O'DONNELL: Mr. Kolodner, you can have the witness to question, I've finished. Thank you.

CROSS EXAMINATION

BY MR. KOLODNER:

Q. That's a pretty dress you have on.

A. Thank you.

Q. That was a pretty jacket you had on when you came in. Who gave you that jacket?

A. My uncle.

Q. Where is that jacket? Could you get the jacket for us, sir?

MS. O'DONNELL: For the record, the camera technician is going to the Judge's ante-chamber to retrieve the jacket that is near Judge Kane's secretary's desk.

Q. It's a beautiful jacket. Put it on. Let me see how pretty you look with it. Oh my, that looks good. What is that, what does it say?

A. That's my name.

Q. What's that say? I can't see from here.

A. Brooke.

Q. Oh, Brooke. And what does that say?

A. It says the same thing except it's in Korean.

Q. Oh, what does that say? Brooke too?

A. Yeah.

[1-73] Q. That says it in Korean. What's on the back of your jacket?

A. It says Korea.

Q. So you were born in Korea?

A. (No audible response)

Q. What did you say your full name was?

A. Brooke Etze.

Q. Now, what's your middle name?

A. Su Jin.

Q. Su Jin, that means Brooke in Korean?

A. Yes.

Q. I see. How long did you go to Mrs. Craig's school?

A. Well, a long time.

Q. A long time.

A. Probably for two years or so.

Q. I didn't hear what you said, Brooke.

A. Probably for two years.

Q. For two years. There were many times when you had a good time there weren't there?

A. No.

Q. You never had a good time there?

A. No.

Q. Was it always bad there?

A. Yes.

Q. Did anyone tell you to say that it was bad there?

[1-74] A. No.

Q. Some people . . . some people tell you?

A. No. It just was bad to me.

Q. Have you ever been in this room before?

A. Yes.

Q. How many times have you been in this room?

A. A few times.

Q. Now you counted for the Judge up to twenty. Can you count up to twenty?

A. (No oral response)

Q. Let's hear you count to twenty again.

A. 1-2-3-4-5-6-7-8-9-10-11-12-13-14-15-16-17-18-19-20.

Q. That's very good. That's very good. Now, you said you've been in this room before and you said a few times and you can count up to twenty, how many times would you say that you have been in this room?

A. Two.

Q. Two times. When were you in here last?

A. The time I was visiting.

Q. Visiting with whom?

A. Kate.

Q. Kate. Do you mean Kate O'Donnell, the lady that's sitting here?

A. Yeah.

Q. Alright, now when was that?

[1-75] A. Well, a little while ago.

Q. Today or another day?

A. Another day.

Q. And you were brought in here?

A. Yes.

Q. Were you asked some questions when you were brought in here?

A. No, but she told me a little bit about it.

Q. What did she tell you?

A. Well she told me that the Judge would be sitting here asking me a few questions - what's my name and how I am, where I go and all that.

Q. The questions that . . . like you were asked here today, is that right?

A. Yes.

Q. So that you would know what questions you were going to be asked?

A. Yes.

Q. And you were here on another time you said?

A. Yes.

Q. And who brought you here then?

A. Kate.

Q. How long ago was that?

A. On Friday. I mean Kate . . . oh, that was a few weeks ago, on Tuesday. One day was on Friday and the other day was [1-76] on Tuesday.

Q. So a few weeks ago you were brought in this same room, is that right?

A. Um huh.

Q. And you were told what questions were going to be asked of you then?

A. Yeah.

Q. Who . . . who told you what questions were going to be asked of you?

A. Oh, that's a toughy.

Q. Well, it was either your mother or Kate, right?

MS. O'DONNELL: Objection

Q. You shook your head.

THE COURT: Counsel, I overrule the objection.

Q. You said it was either your mom or Kate, right, because they're the only ones that brought you here, isn't that right?

A. Yes.

Q. Alright, so you don't remember which one told you?

A. No.

Q. But you were told the questions that you were going to be asked?

A. Yes.

Q. And were you told the answers that you were supposed to say?

[1-77] A. No.

Q. Now, after each time that you came here, did you get a gift or present or a reward?

A. No.

Q. You got some ice cream, didn't you?

A. No.

Q. Didn't you get some ice cream?

A. No. I can't eat ice cream.

Q. Why?

A. Because I went to the doctor's and I had some stomach aches and I just can't eat milk . . . I can't drink milk or eat something that has milk.

Q. Is that just recently?

A. Yes.

Q. I see, but before you had ice cream, right?

A. Yeah.

Q. And you were rewarded with ice cream in the past, isn't that right?

A. (No oral response)

Q. You're shaking your head yes?

A. Yes.

Q. Okay.

A. I wasn't rewarded for ice cream or any of that stuff when I came here.

Q. Well how about in the other office that you were [1-78] taken to, you were at the other office . . . Kate's other office were you not?

A. Yes.

Q. How many times were you there?

A. Oh, let me see, three times.

Q. Three times. Alright, during those times you were told what questions would be asked of you, right?

A. I'm not sure.

Q. What did you do there three other times in Kate's office?

A. Well, Kate introduced me to people and she showed me around a little bit. That's mostly what we did. Then we came up to the court house.

Q. Those three other times you came up to the court house?

A. Only two times.

Q. Two times. Three times . . . three times . . . let's get it straight because I'm a little mixed up. You . . . you were in Kate's office three times, right? Three times, correct?

A. No, I was in here two times.

Q. Oh, in this office where we are now by this table or this desk, two times?

A. Yeah.

Q. Okay. Sometimes you got rewards for telling certain answers, didn't you?

[1-79] A. I don't understand.

Q. Okay, well, if . . . if you told the answers that satisfied your mommy, she gave you a present, didn't she?

MS. O'DONNELL: Objection.

THE COURT: I overrule the objection.

A. Not always.

Q. But sometimes?

A. Yeah.

Q. Sometimes. So when you would say the things she wanted you to say, after you left here, she would give you a gift, right?

A. Well, she would give me a kiss or a hug.

Q. And she didn't like it when you didn't say the answers she wanted, isn't that right?

A. Sometimes, not always.

Q. Did she ground you . . . did she ground you once?

A. Yeah, once.

Q. For not saying the right answers, isn't that right?

A. No, for doing something else.

Q. What was that?

A. Well, for telling a lie.

Q. What was that lie?

A. When Natalie broke my tape.

Q. Broke your teeth?

A. My tape.

[1-80] Q. Tape.

A. It's not . . . it's not the kind that you fix something with. The kind that you play in the tape recorder.

Q. Oh, I see. You said that Natalie broke it, but she really didn't did she?

A. No.

Q. But you lied, didn't you?

A. Yes.

Q. Told a fib, huh?

A. Yes.

Q. And your mom grounded you?

A. Um huh.

Q. Do you get grounded a lot?

A. No.

Q. But you have been grounded some times?

A. Yeah.

Q. When was the last time you were grounded?

A. Oh, last year when mommy couldn't understand anything about Mrs. Craig's.

Q. And then when you made mommy understand and you told mommy what she wanted to hear, then she didn't ground you anymore, is that right?

A. Yes.

Q. I see. And, why did you say a lie about Natalie? Did you like her?

[1-81] A. Yes I like her, but I just didn't want to get in trouble.

Q. You wanted to get her in trouble though, huh? Is that right?

A. Yes.

Q. So you told something that wasn't true in order to get Natalie in trouble, is that right?

A. Yes.

Q. How did your mom find out about it?

A. I told her.

Q. You finally told her, huh?

A. Yeah.

Q. Well, it bothered you I guess that you told a fib, huh?

A. That's the only time I got grounded.

Q. So, now, if I told you that I was superman, would that be true?

A. No.

Q. (Inaudible) like superman, don't you? You know that. Now, if I gave you a present and said I was superman, then would you say I was superman?

A. No.

Q. Do you like this doll?

A. Yes.

Q. Isn't that a pretty doll, huh?

[1-82] A. Yes.

Q. If I said I am going to give this to you if you say I'm superman, would you say superman then?

A. No.

Q. I will give you the doll anyway because I think you're so pretty.

A. Thank you.

Q. Now, I want to ask you a few more questions. You . . . you mentioned that Mrs. Craig hit you with a stick.

A. Yes.

Q. Is that really true, Brooke?

A. Yes.

Q. Truth?

A. Yes.

Q. And where did she hit you?

A. In my private.

Q. Where did you learn the word private? Did someone tell you to use that word?

A. No.

Q. Well, how did you know to use the word private?

A. Well, my mommy just so much talked about private . . .

Q. Your mom . . .

A. . . . just . . . it just . . .

Q. . . . your mom talked about it as a private and that's how you got to know the word private, right?

[1-83] A. Um huh. It's in every story.

Q. It's in every story your mom tells you?

A. Um huh.

Q. When did your mom start telling you stories about privates?

A. Well, she didn't, she just mentioned a lot about my privates since I've told . . . she mentioned a lot about them because I told a lot about my privates.

Q. And she told you to use that word, is that right, for that area, is that what you mean?

A. I mean she . . . she asked a lot about my privates. First she said did Mrs. Craig hurt you in your privates a lot of times and it just appeared. I don't know how it meant my private parts, but I just (inaudible) in like my privates.

Q. Because she kept asking you that question about your privates . . .

A. Over and over.

Q. . . . that's why you . . . over and over, is that what you just said?

A. Yeah.

Q. Over and over. And then you got to learn to use that word private, is that correct?

A. Yes.

Q. Now, did . . . you say your mother asked you this a lot [1-84] of times, is that right?

A. Yes.

Q. A whole lot of times.

A. Yes.

MS. O'DONNELL: Objection.

THE COURT: I'll overrule the objection.

BY MR. KOLODNER:

Q. Did . . . you mentioned that . . . that you've . . . that Mrs. Craig had thumb tacks, is that what you said?

A. Yes.

Q. And now, what . . . tell me just what she did with the thumb tacks.

A. Well, she made little holes on her hands sometimes to make them look like spider bites.

Q. She would make little holes in your hands?

A. Yes, to make them look like spider bites.

Q. Would your hands bleed?

A. No.

Q. No.

A. Just little prickies.

Q. Little prickies.

A. Yes.

Q. Was that on the back or the front of your hands?

A. Just the front.

Q. And who called them spider bites?

[1-85] A. Mrs. Craig.

Q. I see. Now, did Mrs. Craig use that stick on your private a lot?

A. Yes.

Q. Now you counted before up to twenty for me and you counted up to twenty for the Judge before so you're good at counting, right?

A. Yeah.

Q. How many times would you say that she used that stick on you?

A. Well, about a lot of times.

Q. Could you tell me in numbers what the amount a lot . . .

MS. O'DONNELL: Objection. She answered the question.

A. Well . . .

THE COURT: I'll overrule the objection.

Q. You may answer the question.

A. She . . . she probably did it . . . I don't know how many times, but she did it a lot.

Q. A lot. More than once then?

A. Yeah, more than once.

Q. And would the stick go into your body?

A. No, she just touched me somewhere where I didn't like to be touched.

Q. But the stick never went inside your body?

[1-86] A. No.

Q. Never, right?

A. Right.

Q. Now you're sure?

A. Yes.

Q. Okay, so the stick never went into your body?

A. Right.

Q. But you had trouble, didn't you, with some other people with a stick like . . . do you know Todd and Salem? Do you know Todd?

A. Yeah.

Q. Who is Todd?

A. He . . . he's Salem's brother.

Q. And did Todd and Salem go to Craig's also?

A. Yes.

Q. Um huh. Were they about your age?

A. No. Todd was younger than me, he's four, and . . . five, and Salem was older than me. He was six.

Q. Now did they bother you with sticks sometimes?

A. No, they just bothered me by . . . they were after . . . boys chase girls and girls chase boys.

Q. Were they after you?

A. Yeah! Four people loved me at that school.

Q. Four people loved you?

A. Yeah.

[1-87] Q. Who were they?

A. Well, I mean only three people - Todd, Salem and Zachery.

Q. Todd, Salem and Zachery, they loved you, right?

A. Yeah.

Q. They told you this, huh?

A. Um huh.

Q. And . . . but sometimes you had a little trouble with Todd and Salem with sticks, didn't you?

A. Yeah.

Q. Okay, because they . . .

A. Sometimes they would throw them.

Q. Didn't you tell your mom that sometimes Todd and Salem would touch you in your privates with the stick too?

A. No.

Q. Didn't you tell your mom that?

A. No, they never did that. They would just throw the stick.

Q. What would they do with the sticks?

A. They'd just wave them back and forth and they would just play rough with me sometimes.

Q. And where would they hit you with the sticks?

A. They would never hit me with them.

Q. Well, you had a little trouble with Todd and Salem with the tacks too, didn't you?

[1-88] A. No.

Q. Didn't they put tacks on the sliding board?

A. No.

Q. Didn't you tell your mom that?

A. No.

Q. You never told her that?

A. They didn't do it.

Q. But you did tell her that, right?

A. No.

Q. So Todd . . . never . . . you never told your mom that Todd and Salem put tacks on the sliding board?

A. They never did that.

Q. Well, I know they didn't do it, but once you said it to your mom, didn't you?

A. No.

Q. Didn't you tell your mom once that Salem or Todd stuck you between your legs with the stick?

A. No.

Q. You never said that?

A. (No oral response)

Q. Now, you mentioned a rabbit before.

A. Yes.

Q. What happened . . . what happened to the rabbit?

A. She killed it.

Q. When you say she, who is she?

[1-89] A. Mrs. Craig.

Q. What did she use to kill it?

A. I'm forgetting. A hammer.

Q. A hammer?

A. Yeah.

Q. Is that what you just said?

A. Yes.

Q. What did she . . . take and hit it and rammed it with a hammer?

A. Huh huh, she put it on top of the rabbit.

Q. And killed the rabbit with the hammer?

A. Part of it's heavy in the front and in the back part it's light because it was plastic.

Q. Um huh. And did she hit the rabbit with the part . . .

A. No, she . . .

Q. . . . the heavy part?

A. Yes.

Q. And that's how the rabbit died, is that right?

A. Yes.

Q. Did the rabbit bleed a little bit?

A. No, just stopped breathing.

Q. Did she hit it a lot . . . a lot of times with the hammer?

A. Once.

Q. Once. Did you ever tell your mom . . . do you know a [1-90] Katie Heacock?

A. Yes.

Q. Who is she?

A. She's somebody who went to Mrs. Craig's school.

Q. How old is she?

A. I'm not sure.

Q. Is she younger than you?

A. No, she's much . . . yeah, yeah, she's probably . . . yeah, I know how old she is. By now she's four years old.

Q. I see. Did you tell your mom that Mrs. Craig hit her with a rock?

A. Yes.

Q. And she almost died, isn't that what you told your mom?

A. No, she hit her with a rock, but she never fell or anything. That's strange.

Q. Hit her in the chest, isn't that right?

A. No.

Q. Huh?

A. On her leg.

Q. On her leg. I thought you told your mom that she hit her in the chest with a rock?

A. No.

Q. You never said that?

A. (No oral response)

[1-91] Q. You never said that?

A. No.

Q. Did you say that Katie almost died?

A. No.

Q. You never said that?

A. No.

Q. You never told your mom that Katie was hit in the chest with a big rock by Mrs. Craig . . .

A. No, I didn't say rock.

Q. . . . and she almost died?

A. Almost the size of an egg.

Q. And that she almost died?

A. She . . . she . . . I never told her that. I wasn't sure.

Q. That wasn't true, okay. Now, did Salem and Todd put thumb tacks on the chairs. They did that sometimes, didn't they?

A. No.

Q. You never told anyone that Salem and Todd put tacks on the chairs?

A. No.

Q. Well, do you know Mary Burke?

A. Yes.

Q. And who's Mary Burke?

A. She's my . . . she's a friend of mine.

Q. And you've been to see her a lot of times, haven't [1-92] you?

A. Yes.

Q. She's very nice?

A. Yeah.

Q. And, I have something else for you. Where did you say you were born?

A. In Korea.

Q. Is that a Korean baby?

A. (No oral response)

Q. Sure looks like it, doesn't it?

A. Yes.

A. Yes.

Q. She's pretty, isn't she?

A. Yes.

Q. Not quite as pretty as you though, but she's pretty, right?

A. Yes

Q. Well, you've been a real good girl and I'm going to give you this present. Do you like that one?

A. Yes.

Q. That's good. That's . . . now you've got a Korean doll.

A. I'm a collector of dolls.

Q. Are you really?

A. Um huh.

Q. How many do you have?

A. One just broke.

[1-93] Q. Oh, that's terrible. What did it drop on the ground?

A. No, we were at hands on science and my friend just lifted it up and then had fell on the floor.

Q. The head fell off? Oh, that's terrible. You can get that fixed, can't you?

A. Yeah. I can glue it back on.

Q. Oh, sure. You can take care of that.

A. 'cause we know somebody who fixes dolls.

Q. Oh, so you can take it to the doll hospital, right?

A. (No oral response)

Q. Sure, I know you knew about that. I'd like to ask you about Mary Burke. Mary Burke . . . you went to see her a lot of times, didn't you?

A. Yes.

Q. Now, remember we counted up to twenty before.

A. Yes.

Q. You're good at that.

A. Yeah.

Q. You did it for the Judge and you did it for me. Now, did you see Mary Burke twenty times?

A. I saw her a lot of times.

Q. Do you think that you saw her twenty times?

A. I saw her a lot of times. I'm not sure how many times I saw her, but I saw her a lot of times.

[1-94] Q. A lot of times. A lot more than you saw Kate, correct?

A. I saw Kate less more, but I saw . . . she began to come when I told a little more.

Q. You mean the more you told her the more she would come, right?

A. Yeah.

Q. And she asked you a lot of questions didn't she?

A. Yes.

Q. A lot of questions. She wanted to talk all about Mrs. Craig, didn't she?

A. Yes.

Q. Did she tell you you were coming here today?

A. My mom and dad told me that too.

Q. And so . . . so Kate told you . . .

A. And my parents told me.

Q. Your mom and dad told you and Mary Burke told you, right?

A. Yes.

Q. And Mary Burke told you what kind of questions were going to be asked you here, right?

A. No.

Q. Now, did Mary Burke sometimes tell you that Mrs. Craig was bad?

A. I'm not really sure.

[1-95] Q. But she may have, huh?

A. Yeah, and she may not have.

Q. But you're not sure.

A. No, I'm not sure.

Q. But Mary Burke wanted you to tell her all about the bad things about Mrs. Craig, didn't she?

A. Yes.

Q. She . . . almost every time you went there I bet you she asked you about the bad things about Mrs. Craig, didn't she?

A. Not all the time, sometimes.

Q. Almost all the time though?

A. Yeah.

Q. Almost all the time though, right?

A. Yeah.

Q. And . . . and when you would tell Mary Burke the bad things about Mrs. Craig, your mom liked that, didn't she?

A. No. I mean yes.

Q. Okay, and then sometimes . . . at that time you could eat ice cream, couldn't you?

A. Yes.

Q. And when you'd say bad things about Mrs. Craig you were rewarded with ice cream then, weren't you?

A. Well, not all the time just sometimes.

Q. Sometimes, sometimes. Alright . . .

[1-96] A. Sometimes my mom would give me a treat for telling me a lot of it.

Q. Uh huh.

A. She'd let me pick something.

Q. She'd let you pick something out, huh?

A. Yeah.

Q. So it didn't have to be ice cream it could have been something else?

A. Yeah.

Q. So you'd always get a treat for saying something bad about Mrs. Craig, right?

A. Well, I would not always, just sometimes.

Q. Just sometimes. Okay. Because sometimes you would tell some of the children on your bus that you go to school with. So whenever you said something bad about Mrs. Craig you were given a treat. Didn't you tell some of the kids?

A. No.

Q. No.

A. My mom said, to not tell anyone because she just thinks that it's not very good to tell other kids about something. But there's only one thing you can tell about, only if you need to, is if you need somebody to help you you can tell them to help you, but that's not what . . . that's not what my mom means. She means to tell people that I trusted her.

[1-97] Q. But your mom was real happy when you spoke about Mrs. Craig and the bad things, right?

A. Yes.

Q. Okay, and sometimes you were grounded if you didn't say something bad about Mrs. Craig, right?

A. No.

Q. Once.

A. Yes.

Q. Once . . .

A. That was about somebody else.

Q. Oh, who was that about?

A. Natalie Baker.

Q. What about Natalie Baker? Who is she?

A. She's my best friend and we both play together.

Q. What did you say something bad about Natalie?

A. No, I said that she broke my tape and she hid it in my closet.

Q. And that's . . .

A. And that wasn't . . .

Q. . . . that didn't happen . . .

A. I broke it.

Q. I see. And you made that lie up yourself?

A. Um huh.

Q. You figured . . . you thought it up yourself to say Natalie did it, huh?

[1-98] A. Yeah.

Q. And then did Natalie get in any trouble?

A. No.

Q. And what . . . what did you tell your mom again? You said that Natalie broke the tape and hid it in your closet?

A. Yes.

Q. Well, did anyone hide it in your closet?

A. I did.

Q. Oh, you did. And . . .

A. Natalie didn't break the tape . . .

Q. Oh.

A. . . . I broke the tape, I hid it . . .

Q. That's what you said . . .

A. . . . and told my mom a fib.

Q. Alright, but you said that Natalie did it?

A. Yes.

Q. I see. You told her that Natalie did it because you didn't want . . .

A. To get in trouble.

Q. . . . to get in trouble, but your mom found out anyway, didn't she?

A. (No oral response)

Q. She said it doesn't really pay to lie, does it?

A. No.

Q. You must tell the truth, right?

[1-99] A. Yes.

Q. Now, did Mary Burke tell you to say bad things about Craig's School?

A. No.

Q. She liked it though when you said bad things about the school, right?

A. She just likes me to talk about it.

Q. Did she ever bring you to this courtroom . . . to this room here?

A. No. Kate and my mom did. My mom only came once.

Q. And Kate brought you twice?

A. Yeah. Kate went with us, my mommy went too.

Q. I see. Now think again, Brooke, did you ever tell anyone . . . that Todd or Salem punched you with the stick between your legs. Try to think that maybe you told your mom. Do you remember, maybe you told her that Salem or Todd punched you between your legs with the stick?

A. I can't remember. That's one that I can't remember. The only thing I . . . I have to say I never do remember them doing it.

Q. Do you remember them putting tacks on the sliding board?

MS. O'DONNELL: Objection. Your Honor, that's been answered.

THE COURT: I'll sustain the objection.

[1-100] A. No.

Q. Did you ever talk to Mr. Warfield?

A. (No oral response)

Q. Do you know Mr. Warfield?

A. I know who he is, but I just . . . oh, yeah, I never talked to him. He always says hi and goodbye and all that. I just sometimes talked to him, but not always.

Q. Did he ever ask you any questions?

A. No.

Q. Did he ever bring you to this room before?

A. No.

Q. Now, you mentioned that you would get grounded when you would tell a lie. When was the last time you got grounded?

A. I only got grounded once.

Q. What was your punishment.

A. The punishment was I broke the tape and I told a lie.

Q. Did mommy make you stay in your room?

A. She always made me stay in my room.

Q. How long was that?

A. For ten minutes.

Q. Ten minutes.

A. I think ten or twelve.

Q. Okay. That was . . . that was plenty bad. Now, how about all the other times you were grounded, what punishment did you get?

[1-101] A. Hum, that's a tough one. I'm not sure.

Q. You forgot what punishment it was, but you were grounded before?

A. Yeah. I've learned my lesson.

Q. Because you've been grounded pretty many times, huh?

A. Yeah.

Q. It doesn't pay to tell fibs, does it?

A. No.

Q. So you say you've learned your lesson now that you've told so many fibs, right?

A. Yes.

MS. O'DONNELL: Objection.

THE COURT: Sustain the obejection.

Q. Did you ever tell what is known as a white lie?

A. What's a white lie?

Q. You don't know what a white lie is?

A. No.

Q. Just a little fib.

A. No, I've never done that. I've made big fibs up before (inaudible).

Q. So you tell big fibs. Are you shaking your head yes?

A. Yes I tell fibs.

Q. Did anyone mention my name to you before today?

A. Kate.

[1-102] Q. Kate said . . .

A. She mentioned a little bit about you.

Q. She told you about me, right?

A. Yeah.

Q. She told you that I was Mrs. Craig's lawyer, right?

A. Yes.

Q. Alright.

A. Also my parents told me.

Q. They told you about it too?

A. Yes.

Q. So before you got here you knew who I was?

A. Yeah. I just thought you would look like that.

(LAUGHTER IN COURTROOM)

Q. I hope I didn't frighten you too much.

A. No.

Q. No, that's good.

A. You're nice.

Q. I'm nice.

A. Yeah, even though you're Mrs. Craig's lawyer.

Q. Ah, that's nice of you to say that because I think you're a very nice little girl. You're very pretty.

A. Thank you.

Q. I'm worried about that doll, but I know you can fix it up, can't you?

A. Yes, don't worry, she'll be new.

[1-103] Q. The doll hospital will fix it up.

A. Yes.

Q. Did your mommy tell you that I would ask you bad things?

A. No.

Q. Have you ever touched yourself between your legs, Brooke?

A. No.

Q. Did you ever put a pen or pencil there?

A. No.

Q. Any other kind of object?

A. No.

Q. Did you know Chris?

A. Chris who?

Q. Do you know any boy by the name of Chris?

A. (No oral response)

Q. You're shaking your head.

A. Yes.

Q. Yes. Who was Chris?

A. The only Chris I know is Chris Hill.

Q. Is he . . . did he go to Craig's school too?

A. No.

Q. Now who is Chris Hill?

A. He's my friend. He goes to my school now. He used to not go to my school, now he does go to my school.

[1-104] Q. He bit you once, didn't he?

A. No.

Q. He didn't?

A. No.

Q. Didn't you tell your mother once that he bit you on your private?

A. No.

Q. You never told her that?

A. No, he never did that.

Q. Maybe you fibbed when you told her?

A. I . . . he never did that.

Q. Well, did you ever tell her that he did . . . that he did that?

A. He never did that.

Q. Okay, well, let's say he never did it, but did you ever say that he did do it?

A. No.

Q. I'm going to show you a picture. Who's that picture of?

A. That's me.

Q. Is that you?

A. Yes.

Q. What are you doing there?

A. We're sliding down the sliding board.

Q. Did anyone ever put tacks on that sliding board?

[1-105] A. No.

Q. No.

A. But if somebody would put tacks on the sliding board I would have saw them. Nobody ever did that.

Q. Now, I show you another picture.

MS. O'DONNELL: The State has no objection to the time, subject to identification and marking this for an exhibit.

MR. KOLODNER: I'm not sure how we're going to go about that. We'll do that when it comes.

Q. Now I show you that picture. Do you see yourself on that picture?

A. Yes.

Q. And you're smiling there, you look pretty there, don't you?

A. Yeah.

Q. Who are the two ladies standing on each end of the picture?

A. This isn't a lady, that's a cake.

Q. On that . . . that lady there with the white blouse on.

A. That's Miss Caroline.

Q. Miss Caroline. Is she a teacher?

A. Yes.

Q. Okay and on the other end of the picture who is that?

A. Miss Tessie, she was my piano teacher.

[1-106] Q. She was your piano teacher?

A. Yes.

Q. Okay. You look real happy there.

A. Yes.

Q. Were you happy?

A. Oh, and that's Miss Alise.

Q. That's Miss Alise.

A. Yes.

Q. That's her here. Where you real happy?

A. It felt like I had to be happy. Sometimes I had to be happy so I just seemed like . . . I just acted like I was happy. So I didn't want anybody to know this.

Q. Alright, I'm going to show you another picture. Do you see yourself on that picture?

A. Yes.

Q. And who else . . . what adults are on that picture?

A. Ah, what is her name again?

Q. Was she a teacher?

A. Yeah, this one.

Q. Her indicating the lady setting down . . .

A. Yes.

Q. . . . with a dress on, right?

A. Yeah.

Q. And on the other end of the picture is who?

A. That's Mrs. Craig. She never wore this. I never [1-107] saw her in that. She wore . . . most of the times when

I saw her she wore dressier . . . more dressier clothes, but I never saw her wear that. I can recognize three people . . . no, four people. I know these . . . I know Brice, that's me, that's Randy and I forget his name. I know him, but I forgot his name.

Q. Okay. Now, when was the first time that Mrs. Craig struck you?

A. What do you mean?

Q. Well, struck you either with a stick or her with [sic] hand or with anything else?

A. Well, she hardly ever struck me except in my privates.

Q. And that was a lot of times you say?

A. Yes.

Q. Do you remember was it when you first came to this school, or was it after you had been there a long time?

A. After I had been there a long time.

Q. Were you in . . . had you been there to graduate?

A. Yes.

Q. And she struck you before you graduated?

A. She never struck me . . .

Q. Okay, and with this stick . . .

A. . . . except on my privates.

Q. . . . had she used the stick before you graduated the [1-108] first time?

A. Yes.

Q. And you never said anything to your mommy or daddy?

A. No.

Q. And all the times that she used it, you never told the bus driver, you never told anybody?

A. I never remember a bus driver. That must be the hardest part.

Q. What's that?

A. Remembering my bus driver. I just wish I had a picture of her, just one.

Q. When did you decide to tell . . . who did you tell first?

A. My dad. I guess I told him first.

Q. What did you tell him?

A. I told him that . . . I told him a lot of things first which I can't remember, but I told him a lot of things before I told . . .

Q. But you can't remember what you told your dad? Are you shaking your head no?

A. Yes, I'm shaking my head no.

Q. Now, tell me what you did tell your dad.

A. Well, I told my dad that . . . that's a toughy. I told him a lot of things, but I can't remember. I can't remember. I know I told him a lot before I told my mom most.

Q. But then you began talking to your mom more than to [1-109] your dad, is that right?

A. Yes. Whenever she picked me up, I just would say I had a good day and I can't remember anything from kindergarten and kept . . . and I complained to them and I can't . . . I can't remember anything from kindergarten.

Q. You complained to them that you couldn't remember anything?

A. Yeah, and I said it was a hard day in kindergarten and at the school and I told them that, but she never could believe.

Q. So you told your dad and he wouldn't believe you?

A. He wouldn't believe me.

Q. And you told him about the stick and he wouldn't believe you . . .

MS. O'DONNELL: Objection.

A. Um hum. I told him about everything I could.

Q. Did he tell you he didn't believe you?

A. He never told me, I just knew he wouldn't believe me.

Q. Is that why you didn't tell him in the first place?

A. Yes.

Q. How many times would you say that you told your dad?

A. I told him nothing, except when I started to tell.

Q. And he wouldn't believe you?

A. Yes.

[1-110] Q. Did you say he didn't believe you because sometimes you didn't always tell him the truth?

MS. O'DONNELL: Objection.

A. I just knew he didn't believe me.

THE COURT: Counsel, approach the bench now please.

MS. O'DONNELL: Brooke, wait here until we get back, okay.

THE WITNESS: Yes.

(SOUND PULLED ON VIDEO TAPE)

(COUNSEL APPROACHED THE BENCH AND THE FOLLOWING ENSUED:)

THE COURT: We're going to have some way when I . . . you note an objection that he turns the sound or something. I'm going to overrule the objection, but we're having a problem. When somebody notes an objection, maybe we ought to keep quiet for a minute and I guess we ought to have somebody to have Mr. Pruitt pull the plug or something as we're still getting audio. So when there's an objection . . .

MR KOLODNER: Just pause.

THE COURT: . . . just pause.

MR. KOLODNER: Okay.

THE COURT: Can you hear me coming through here?

MS. O'DONNELL: Yes.

THE COURT: I get a feedback.

MS. O'DONNELL: We get a little feedback noise.

MR. KOLODNER: Yeah, it's like a screeching noise like.

[1-111] THE COURT: But you can hear me when I push that button?

MR. KOLODNER: Well, did you just . . . you just pushed it. We heard you say come in, but before that it was like a screeching noise.

MS. O'DONNELL: There's a screech and then your voice.

THE COURT: Apparently the screech . . .

MS. O'DONNELL: That's something that happens every time. That's the feedback.

THE COURT: Alright. Make sure . . . I will permit you to . . . to . . . when you go back to suggest to Mr. Pruitt or Sheriff Pruitt that when an objection is noted

you all are to keep quiet and he should pull a plug or something for the time being until I . . .

MR. KOLODNER: Well, how will we know what to do after that . . . what you decide to . . .

THE COURT: Because you'll hear me speak.

MR. KOLODNER: Oh, okay.

THE COURT: I'll say sustained to overrule.

MR. KOLODNER: Okay, okay, right.

THE COURT: Can I ask one other thing?

MR. KOLODNER: Yes.

THE COURT: Can I ask you one other thing. I don't want to ask the child any questions. For the purposes of [1-112] clarity I would hope somebody would ask the child that on the one or two occasions, on perhaps on redirect or something, when the child was brought to the Judge's chambers, that the Judge wasn't there.

MS. O'DONNELL: I will make . . . I had planned to do that.

THE COURT: I would be distressed if this jury thought I was there two or three weeks ago and the State's Attorney . . .

MR. KOLODNER: (Inaudible) Yeah, okay, I'll bring that up and I'll make it clear.

THE COURT: Anybody can. Okay.

MR. KOLODNER: Okay, okay.

THE COURT: I mean other than the fact that . . .

MR. KOLODNER: I will make that clear.

THE COURT: . . . and if . . . if need be, you know, we can tell the jury that, I don't think it's necessary, that . . .

MR. KOLODNER: No, I'll make it clear.

THE COURT: . . . prior to . . . to you all questioning the child I did so also, but . . . okay.

MS. O'DONNELL: Yes, Your Honor.

(COUNSEL RETURNED TO THE TRIAL TABLES AND THE FOLLOWING ENSUED:)

(COUNSEL APPROACHED THE BENCH AND THE FOLLOWING ENSUED:

MR. KOLODNER: If it please the court, I have been [1-113] informed by counsel who was in the courtroom and sitting next to the client that the client has on occasion tried to reach me by phone and has been unable to reach me by phone.

THE COURT: Then I would just suggest to counsel that he interrupt these proceedings and tell me that if that's the case.

MR. KOLODNER: Whenever that occurs just say it right then at that time then you'll be given an opportunity to (inaudible).

THE COURT: Again, we're adhering to the same procedure that we had adherred [sic] to before namely, counsel's communicating. Mr. Hurt is communicating, or at least has a phone available to him to communicate with Mr. Kolodner. I have instructed in the courtroom, Mr. Hurt, that if for some reason he can't reach Mr. Kolodner, he just interrupt these proceedings and bring it to my attention. Are there any other preliminary matters, counsel?

MS. O'DONNELL: Alright, let's go back.

(COUNSEL APPROACHED THE TRIAL TABLES AND THE FOLLOWING ENSUED:)

BY MR. KOLODNER:

Q. Brooke, when you came to this room last week and before that with Kate . . . Kate and your mother.

A. Yeah.

Q. . . . the Judge wasn't here, isn't that right?

[1-114] A. Yes.

Q. When you say yes, you mean he was not here, is that right?

A. Yes.

Q. Okay. Today is the first time you ever spoke to that Judge, isn't that correct?

A. Yes.

Q. Did you tell your dad about the spider bites?

A. No.

Q. Just about the stick?

A. I told my mom and dad a lot of things, but mostly about the stick.

Q. And your dad didn't believe you, right?

A. He didn't believe me on the part where I can't remember anything from kindergarten and from Mrs. Craig's. That's the part he can't believe me on, but he can believe me on the stick.

Q. Is that what he said?

A. Yes.

Q. Okay, you've been a very good little girls and I don't have any more questions.

REDIRECT EXAMINATION

BY MS. O'DONNELL:

Q. Brooke, I have a couple of questions more to ask, okay?

[1-115] A. Yes.

Q. First of all, Mr. Kolodner asked you a lot of questions about a person named Mary Burke, didn't he?

THE COURT: Apparently counsel wishes to confer with Mr. Kolodner.

(Mr. Hirt and Mr. Kolodner confer by way of phone)

MR. KOLODNER: Can Your Honor hear me.

THE COURT: Yes.

MR. KOLODNER: Okay. The defendant has stated that she has tried to reach me by telephone and was unable to when it was malfunctioning and has given me several questions to ask and I ask permission to ask those questions at this time.

THE COURT: You may do so.

CROSS-EXAMINATION CONTINUES

BY MR. KOLODNER:

Q. Did you—Brooke, did you ever show the spider bites to any of the other children?

A. No.

Q. How come?

A. Because we all got them?

Q. All the kids got the spider bites.

A. Yes. Whatever she did to somebody else, she would do to all the other kids.

[1-116] Q. Can you give me the names of some of the other kids that got spider bites?

A. Stacy, Shannon, Stephanie, Mandy.

Q. Okay, Stacy——

A. Um-hum.

Q. —Shannon. What's Stacy's last name, do you know?

A. Stacy Myers.

Q. Stacy Myers and Shannon, what's her name?

A. I forgot her last name.

Q. Okay, Shannon, and who else?

A. Stephanie.

Q. Stephanie and what's her last name?

A. McCrotchen.

Q. And who else?

A. Mandy.

Q. Mandy and what's her last name?

A. Jones and Carey.

Q. Carey?

A. Yeah, they're both sisters.

Q. Carey Jones?

A. Yeah.

Q. And she got the spider bites too, huh?

A. Yes.

Q. And who else?

[1-117] A. That's mostly all the kids I can think of.

Q. But you say all of them there got them, is that right?

A. Um-hum, yeah.

Q. Did you see the other kids getting these bites?

A. Yes.

Q. Where were they when they got the bites?

A. The same place I was, outside on the playground.

Q. Where were the teacher's [sic]?

A. Outside on the playground.

Q. So when you got these spider bites and the other children got the spider bites, the teacher's [sic] were there too, is that right?

A. Yes.

Q. And the teacher's [sic] saw this too, is that right?

A. Yes.

Q. What are some of the names of the teacher's [sic] that were there?

A. Miss Elise.

Q. Miss Elise.

A. Miss Caroline.

Q. Miss Caroline, and who else?

A. Miss Tessie.

Q. Miss Tessie, and who else?

A. That's all I can think of.

Q. Okay. So that we understand what we're talking [1-118] about, you say that the other children that were there also got the spider bites?

A. Yes.

Q. Okay and that this was on the playground?

A. Yes.

Q. And that the—when they got the spider bites, the same as you did, the teacher's [sic] that you named were there and they saw this and that was Miss Elise, Miss Caroline and Miss Tessie, is that right?

A. Yes.

Q. Now, talking about the opossum. What does an opossum look like?

A. Well, he has a tail.

Q. He has a tail.

A. He has ears.

Q. Um-hum.

A. He has a body, he has eyes and I'm not really sure if he has a nose. He has legs. I'm not sure if he has (inaudible).

Q. Okay. Now explain again what happened to the opossum?

A. She made him dizzy.

Q. He was in a can?

A. A trash can.

Q. And where was this trash can, on the playground?

[1-119] A. Yes.

Q. And who else was playing on the playground, the same kids?

A. Some of them could have been absent.

Q. Well, can you remember who was there?

A. I know everybody was there that time.

Q. And with the opossum, all the children you named before with the spiders were there with the opossum?

MS. O'DONNELL: Objection.

A. Yeah, yes.

(Sound pulled on video)

THE COURT: I'll overrule the objection.

Q. And were the same teacher's [sic] there?

A. Yes.

Q. Now, did you ever go camping with your daddy?

A. Yes.

Q. In the woods?

A. Yes.

Q. Did anyone touch you in your privates then?

A. No.

Q. How often did you go camping in the woods with your daddy?

A. Well, every summer, almost every summer.

Q. Would your mom go or just you and your dad?

A. Me and my dad mostly.

[1-120] Q. Now, you like to play games don't you Brooke?

A. Yes.

Q. You like to play mother. Is that the game you like to play?

A. Yes.

Q. And you like to be the mother, right?

A. Yes.

Q. Huh?

A. Yes.

Q. But Mrs. Craig, she wanted to be the mother some time, is that right?

A. Right.

Q. And you got mad because you wanted to be the mother, right?

A. Yes.

Q. Huh?

A. Yes.

Q. Do you still play mother?

A. Yes. I play mother with the kids.

Q. Do you. Are you the mother now where you go to school?

A. Yes.

Q. What does the mother do?

A. Well she plays and she works and she cooks.

Q. She works and she cocks.

[1-121] A. And she plays.

Q. Do you like to make believe?

A. Yes.

Q. Do you put on high heals [sic] and long dresses?

A. Yes.

Q. And what do you make believe, that you're the mommy of all the children, right?

A. Yes.

Q. What other games do you play make believe?

A. Well, I make believe all sorts of things.

Q. (Inaudible), that's a good game. Tell me what games.

A. I play airplane.

Q. Play what?

A. Airplane.

Q. What's that?

A. Well, it's where I get on my bed and pretend like I'm the airplane person and all my stuffed animals line up and I play with them.

Q. You get on what?

A. My bed.

Q. Uh-huh and you make out the bed's the airplane?

A. Yes.

Q. And you're the pilot, huh?

A. Yeah, and my kids are the passengers.

[1-122] Q. Oh, do you talk to the dolls?

A. Yeah.

Q. Do they talk back to you?

A. Yeah,

Q. Uh-huh, your dolls talk to you. What do you say to the dolls?

A. Well I say, hook your seat belts and we're ready to take off, okay.

Q. Uh-huh.

A. And that's mostly what I say to them.

Q. And what do the dolls say to you?

A. They say okay.

Q. They say okay, that's cute.

A. Yeah.

Q. What other game do you play like airplane? That's a good game?

A. I play make believe (inaudible).

Q. Okay, what's make believe? That sounds like a good game.

A. Well make believe is something that you pretend like you—well, you can do a lot of things by make believe (inaudible)

Q. Did you make believe that things are happening that aren't really happening, is that what you mean?

A. Yeah

Q. Uh-huh. Give me an example.

[1-123] A. Well, I sort of like play hide and go seek except it's not real.

Q. You like to make believe and then it feels like the things are happening but they're really not happening, right?

A. Yeah.

Q. Uh-huh and what do you do, tell yourself that they're happening?

A. Yeah.

Q. Do you talk aloud to your dolls and to your toys when you make believe?

A. Yeah, yeah.

Q. And do these toys and dolls answer you?

A. Yeah.

Q. And they make believe too, right?

A. Yes. Everybody makes believe at our house.

Q. Really?

A. Yeah.

Q. Your mommy and daddy too?

A. Our house—yeah, I call it the make believe house.

Q. Really. Well, why do you call it the make believe house?

A. Because we like to make believe sometimes.

Q. Give me an example what your mommy and daddy [1-124] make believe?

A. Well sometimes they make believe we're drawing when we really aren't drawing. Make believe all sorts of things.

Q. So you all get together and make believe something has happened when it really didn't happen, is that what you mean?

A. Yeah.

Q. And you even call it the make believe house, is that what you call it?

A. Yeah.

Q. Does your mommy call it the make believe house too?

A. No. She just calls it a regular house.

Q. But you call it a make believe house?

A. Yeah.

Q. Because you're all getting together and make believe things happen that didn't really happen, right?

A. Yes.

Q. Do you do that often?

A. Yeah. I do it a lot of times.

MR. KOLODNER: I have no further questions.

MS. O'DDONNELL: Brooke, I have a few more questions to ask.

THE WITNESS: And then are we going to be done?

[1-125] MS. O'DONNELL: Yes.

THE WITNESS: Thank you.

MS. O'DONNELL: Listen very carefully.

REDIRECT EXAMINATION

BY MS. O'DONNELL:

Q. We've talked a lot and Mr. Kolodner asked you questions about a lady named Mary Burke?

A. Yes.

Q. Where does Mary Burke work?

A. She works at the—oh, what is it called again. Oh, I forgot what it's called. Oh she works somewhere near Wendy's or the Pizza Hut. That's all I can give as (inaudible)

Q. And what is her job?

A. Well her job is to help people.

Q. How does she help you?

A. Well she talks to me.

Q. Brooke, do you know the difference between pretend and for real?

A. Yes.

Q. Are we pretending here or is this for real?

A. This is for real.

Q. We talked a lot about some bad things that happened at Mrs. Craig's School. Were those pretend or were they real?

[1-126] A. Real.

Q. What is the most important thing anyone remembers when they've got to go to court?

A. To tell the truth.

Q. Have you told the truth about everything about Mrs. Craig?

A. Yes.

Q. Have you told any lies about Mrs. Craig?

A. No.

Q. Has anyone told you to say any lies about Mrs. Craig?

A. No.

Q. Has your mom told you to tell lies about Mrs. Craig?

A. No.

Q. Has your dad told you to tell lies about Mrs. Craig?

A. No.

Q. Has Miss Mary Burke told you to tell any lies about Mrs. Craig?

A. No.

Q. Have I told you to tell any lies about Mrs. Craig?

A. No.

Q. How important is it to tell the truth when you [1-127] go to court?

A. Very important.

Q. Is it more important than pretend or is pretend more important?

A. It's more important than pretend.

Q. Are you telling things about what happened at Mrs. Craig's School because they really happened or are you telling things because someone told you to tell them and they're not true?

A. They're true.

Q. How did your mommy find out about all of the things that happened at Mrs. Craig's?

A. I told her.

Q. How did your daddy find out about all of the things that——

A. I told him.

Q. What did they tell you to say in court today?

A. Nothing. They just said to try my best.

Q. What did I tell you about coming to court today to tell?

A. The truth.

MS. O'DONNELL: No further questions.

RECROSS-EXAMINATION

BY MR. KOLODNER:

Q. What was the name of your girlfriend that you [1-128] said broke the tape?

MS. O'DONNELL: Objection.

A. Natalie.

(Sound pulled on video)

THE COURT: It's harmless. I agree it's not covered by redirect, but I'll overrule the objection.

Q. When you told a lie about Natalie you said at that time you were telling the truth to your mother, didn't you?

A. Yes.

Q. But you were really telling a lie?

A. Yes.

Q. So sometimes you say you're telling the truth when in fact it's a fib or a lie, right?

A. Right.

Q. And sometimes you make believe as to the truth when it's not really the truth, isn't that correct?

A. Yes.

MR. KOLODNER: I have no further questions.

MS. O'DONNELL: No further questions.

THE COURT: Would counsel approach the bench please.

MS. O'DONNELL: Brooke wait here until we come back (inaudible).

(Counsel approach the bench and the following [1-129] ensued)

THE COURT: All right, just wait until we conclude, no. Leave them on. Just leave it the way it is for the time being. Is Mr. Kolodner coming around.

Counsel, obviously we've concluded with this witness. I'm going to excuse her. Has she been summoned by both parties or is she subject to being recalled. Do you really want me to instruct her not to discuss her testimony with anyone. Do you think she's—is there a request that I——

MR. KOLODNER: No, I don't think so.

THE COURT: Okay.

MR. KOLODNER: At this point because it's a little peculiar situation I think we ought to have these marked.

THE COURT: The witness was shown certain documents that were identified—is it any question.

MS. O'DONNELL: No Your Honor. Again, I agree with Mr. Kolodner as to the order. This is the first photograph that she was shown.

THE COURT: Do you want it marked as defendant's one.

MR. KOLODNER: Yes that would be——

THE COURT: Defendant's—no they're not part of the trial. They came in as part of the motion.

MR. KOLODNER: All right.

THE COURT: Defendant's one for identification.

[1-130] (Defendant's exhibit number one marked for identification)

MS. O'DONNELL: The second photograph shown to Brooke Etze by the defense was this photograph, Your Honor, being a school picture from the year 1984-1985.

THE COURT: And that can be marked as defendant's two for identification.

(Defendant's exhibit number two marked for identification)

MS. O'DONNELL: The State agrees with the photograph being shown by Mr. Kolodner and asks that it be marked as an exhibit, number three being (inaudible) photographs looked at and testified to by Brooke Etze dated August 5, 1986. I would indicate for the record that is the same photograph in which the defendant, Sandra Craig, was identified by the witness.

THE COURT: All right, defendant's three has been marked for identification at this juncture. Is that—they're not offered into evidence by the defendant at this time.

(Defendant's exhibit number three marked for identification)

THE COURT: Okay. I would propose to instruct the bailiff that you may, in the jury's presence, release this witness. You have another witness lined up or something.

[1-131] MS. O'DONNELL: Yes Your Honor.

THE COURT: We'll take a five minute break.

MS. O'DONNELL: (inaudible) I'd like a break as well Your Honor.

THE COURT: Okay, thank you.

(Counsel return to trial tables and the following ensued)

THE COURT: Ladies and gentlemen, I'm going to excuse this witness who just testified. I'm going—we're going to take about a ten minute recess. Perhaps you can return to the jury room. We'll reconvene shortly. We'll recess briefly.

THE CLERK: Stand please.

(Brief recess)

THE COURT: All right, have a seat please. Will counsel just briefly approach the bench. Deputy perhaps you could come over—or Officer. What's your rank.

THE SHERIFF: Lieutenant.

THE COURT: All right Lieutenant. Excuse me sir.

(Counsel approach the bench and the following ensued)

THE COURT: Just for scheduling purposes Lieutenant, counsel tell me that they think it unlikely that they will interview another child in chambers through the rest of [1-132] this week, or perhaps Friday or——

MS. O'DONNELL: Sometime this week depending on progress.

THE COURT: So if you—certainly leave all the cables and all that stuff, you know, but if you want to take your camera's [sic] or safeguard them, you probably won't be needed.

THE SHERIFF: Is it okay to leave the wiring down.

THE COURT: Oh yes, leave the wiring and all that. As far as I'm concerned you can leave all this stuff here and everything. You can leave the wiring in chambers. Just do——

MR. WARFIELD: I think at this point the tape should be marked as an exhibit and placed into evidence, into the court file.

MS. O'DONNELL: We would ask it be marked as a State's exhibit Your Honor.

MR. WARFIELD: Mark it as a State's exhibit.

THE COURT: Do you have the ability to take that tape as it exists now. Does it have to be rewound?

THE SHERIFF: Well it should be rewound, you shouldn't stop a tape in the middle or near the end.

THE COURT: What would you propose to do. Have a separate tape for each child.

[1-133] MS. O'DONNELL: I would propose we have at least a separate tape as it relates to the alleged victim and witness Brooke Etze. Now, from the children who would be witnesses only for the purposes of other crimes of common scheme I would specifically delineate a tape.

THE COURT: Do you have the ability to take the tape out of that——

THE SHERIFF: Yes. I can replace it anytime, put a new one in and start over.

THE COURT: Well can you not physically retract that tape as it exists now and just introduce it into evidence.

THE SHERIFF: Yes. Yes sir.

MR. WARFIELD: Could you note the length of the tape at the time so that it's very clear that the—in other words that——

THE SHERIFF: You mean the running time?

MR. WARFIELD: Yeah, the running time.

THE COURT: Can you go in and get it now. I mean, how much does—do you have to rewind it.

THE SHERIFF: It will only take a minute.

THE COURT: Why don't you do that now and we'll receive it in evidence and then everybody understands what's on the tape. Would that be acceptable.

MS. O'DONNELL: It is to the State.

[1-134] MR. KOLODNER: Yes sir. I would like to make some motions this afternoon.

THE COURT: Sure.

(Counsel return to trial tables and the following ensued)

THE COURT: As soon as the technician retrieves the tape, counsel, we'll reconvene. It's going to be an exhibit Mr. Clerk. Either——

(Technician leaves courtroom to retrieve video tape of Brooke Etze's testimony)

THE COURT: Approach the bench please.

(Counsel approach the bench and the following ensued)

THE COURT: Lieutenant Pruitt has the video tape, I take it——

THE SHERIFF: Yes sir.

THE COURT: —that was used in this courtroom. It's the exact video tape of the witness who testified and includes nothing other than what was exhibited in this courtroom, is that correct?

THE SHERIFF: Yes sir.

MR. WARFIELD: Does it include the Judge's questioning of——

THE SHERIFF: Yes sir.

THE COURT: Which was viewed also in this courtroom.

[1-135] MR. WARFIELD: Is there a delineation where that part stops and the examination begins?

THE SHERIFF: There's a pause there.

MR. WARFIELD: But I mean, can you tell the difference?

THE SHERIFF: Yes from the camera angle.

MR. WARFIELD: No, but I'm saying is there any marking on there where you can say where it ends?

THE SHERIFF: No. Only if it's used on the same VCR unit. It's difficult.

MR. WARFIELD: I'm anticipating the possibility that if it is an exhibit that it would be possibly used by the jury during jury deliberations.

THE COURT: Does counsel——

THE SHERIFF: I can run it back if you want.

THE COURT: No, no, no. Does counsel envision at anytime that this video tape would be viewed by the jury?

MR. WARFIELD: I only say that for this reason, Your Honor, I know in may other cases that there are requests from time to time from the jury. If there were requests—I mean, if it is an exhibit it would be possible.

THE COURT: Well perhaps the appropriate release, assuming the Court was of a mind to allow the jury to hear the testimony of that child, the Court could do so by way of [1-136] playing the recording.

MR. WARFIELD: Right.

MS. O'DONNELL: Would the Court prefer it be marked as a Court exhibit?

THE COURT: Well, I was going to suggest that unless there's some problem, unless somebody wants to be the author of it.

MS. O'DONNELL: No.

THE COURT: It would be my . . . it seems to me, unless somebody could convince me to the contrary that it should be part of the record in this case, not exhibited to the jury and it seems to me the Court should receive it as a Court exhibit as opposed as an exhibit——

MS. O'DONNELL: That's understood by the State, Your Honor.

MR. KOLODNER: And now—it's being introduced now as an exhibit.

THE COURT: Well I would receive it and be inclined to receive it subject to objection.

MR. KOLODNER: And this is the time I would like to object, the reasons being the procedure used, a closed video violating the constitutional rights of the defendant, the failure of the telephone at times to work and of the inability of the accused to be confronted by her accuser. For those reasons I object.

[1-137] THE COURT: It's my understand [sic] that on the one occasion that counsel brought to my attention the fact that he was unable to communicate with counsel in the—as Mr. Hirt brought to my attention his inability to communicate with Mr. Kolodner, I stopped the proceedings and is counsel proffering there was some interruption or some other inability.

MR. KOLODNER: That's the only time sir.

THE COURT: Fine, thank you. All right Mr. Clerk, it will be received over objection and will be marked as Court's exhibit number one. It is not to be exhibited to the jury unless I would instruct you otherwise.

THE SHERIFF: I want to add that I'm going to take the tab off here so it can't be tampered with.

THE COURT: Sure.

MS. O'DONNELL: And I would note that Lieutenant Pruitt is doing that in the presence of counsel and the Judge and the defendant.

THE COURT: To keep you from reediting it or taped over. This precludes you from taping over it or something. I know that from what my children tell me. All right. I'm going to have the jurors brought in. Do you have another witness lined up.

• • •

[Certificate of Court Reporter omitted in printing]

[5-1]

IN THE CIRCUIT COURT
FOR HOWARD COUNTY, MARYLAND

Criminal Case No. 15625

STATE OF MARYLAND
VS.
SANDRA A. CRAIG

Defendant

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS
(Trial on the Merits)
VOLUME V OF XII

Howard County, Maryland
Friday, March 20, 1987

BEFORE:

HONORABLE RAYMOND J. KANE, JR.
(and a jury)

APPEARANCES:

For the State:
A. G. Warfield, Esquire
M. C. O'Donnell, Esquire

For the Defendant:
F. Kolodner, Esquire
J. Hirt, Esquire

Janet Falkenstine-Court Reporter
Circuit Court for Howard County
8360 Court House Drive
Ellicott City, Maryland 21043

[5-18] • • •

THE COURT: I'm glad I didn't ask the Sheriff to do it. That's where he was heading. You have the child available within a few minutes to be brought over here, the first child?

MS. O'DONNELL: Yes Your Honor.

THE COURT: Do you have your colleague here this morning.

MR. KOLODNER: He's supposed to be here. He may have been delayed. I have instructed my client as to the telephone. She knows if anytime she wants to reach me via the telephone, that's where it is.

[5-19] THE COURT: Okay.

MR. KOLODNER: That she knows to stand up and address the Court if she cannot reach counsel at the time that it happens. He should be here any minute.

THE COURT: Fine.

MR. WARFIELD: We'll test it just to be absolutely sure.

THE COURT: You would propose to—and if she would wish to communicate with you by phone she would do what, I'm sorry.

MR. KOLODNER: She is supposed to pick up—as I under—I don't know, but I believe she's supposed to pick up the phone and just talk to me.

THE COURT: How is Mrs. Craig or co-counsel of Mr. Kolodner going to communicate with Mr. Kolodner in my chambers.

THE SHERIFF: By the phone. There's a two-way set up.

THE COURT: Okay, good.

(Sheriff explains communications hook-up)

THE COURT: We'll get by somehow.

MS. O'DONNELL: Your Honor (inaudible) communication with Mr. Kolodner is done by phone.

THE COURT: Okay. Well, why don't I excuse the jury and then we'll talk to the child in chambers.

[5-20] (Counsel and the defendant return to trial tables and the following ensued)

THE COURT: Good morning again ladies and gentlemen. Now that you're comfortable, we're going to ask you to return to the jury room for a brief period of time.

(Jury leaves courtroom)

MR. KOLODNER: If it please the Court, could the defendant be excused.

THE COURT: We'll take a brief recess before we commence the proceeding. Would counsel just approach the bench one more time.

(Counsel and the defendant approach the bench and the following ensued)

THE COURT: Just so I understand. First—and I don't know these children's names despite——

MS. O'DONNELL: The first child would be Drew Woodbury.

MR. KOLODNER: Actually I think it's Andrew.

MS. O'DONNELL: I'm not sure about that. It's Andrew but they call him Drew.

MR. KOLODNER: It's Andrew I believe, okay.

MS. O'DONNELL: His last name is——

MR. KOLODNER: Woodbury.

MS. O'DONNELL: W.o.o.d.b.u.r.y.

THE COURT: How old is the child?

[5-21] MS. O'DONNELL: I believe he's five.

THE COURT: That's good enough. All right, let me—before you bring the child in, you better wait for Mrs. Craig to return. Why don't you—we'll take a recess. When you're ready, let us know and then I'll see all of you in chambers. All right, let's recess for a moment.

MR. KOLODNER: I'll inform you when she comes in.

(Competency qualification of Drew Woodbury by the Court in chambers via video tape)

THE COURT: Can we proceed.

THE SHERIFF: As soon as I get this hooked up. We can proceed.

COMPETENCY QUALIFICATION

BY THE COURT:

Q. Good morning, how are you today?

A. Fine.

Q. Could you tell me your name?

A. Drew Woodbury.

Q. Drew, I'm Judge Kane, all right?

A. All right.

Q. I'm just going to ask you some questions and maybe when I finnish the two people behind us might ask you some questions in a little while. How old are you Drew?

A. Five.

Q. And where do you live, do you know the street [5-22] where you live on?

A. Far—Farmer's House Road.

Q. All right, and do you go to school?

A. Yes.

Q. Where do you go to school?

A. E.C.L.C.

Q. E.C.L.C.? Ellicott City, right, what's E.C.L.C., do you know? Well, that's all right.

A. It's a school.

Q. Okay, is it near your house?

A. Yes.

Q. All right. You can just sit back, you don't have to talk into the mike. You're doing a real good job, all right?

A. All right.

Q. It's just important that we hear you and if we can't hear you, this gentleman here with the camera will tell us that.

A. Okay.

Q. What grade are you in Drew, are you in Kindergarten?

A. Yes.

Q. All right and you live at home with your mother, your father, both? Who lives at home with you?

A. Um, both except my father lives far, far away.

Q. Okay. Do you have brothers and sisters?

[5-23] A. No.

Q. You're the only one?

A. No audible response.

Q. Okay. Do you know where you are today? Do you know what this building is here?

A. No audible response.

Q. I'm sorry, if you don't know that's all right. What are—who is your teacher this year in Kindergarten? Do you know her name?

A. Miss (inaudible) and Miss Patti.

Q. Miss Patti, okay, and what do they teach you in Kindergarten, what do you do in Kindergarten?

A. Learn and read.

Q. Read, can you read?

A. Um-hum, (inaudible) because we do math and super—we do math and language with superkids.

Q. Okay, what kind of math do you do? Do you mean with numbers?

A. Numbers, with numbers.

Q. Okay, do you know your numbers?

A. Yes.

Q. What numbers do you know? Can you tell me some numbers? Can you go from one to ten or——

A. I can go one to a hundred.

Q. Well, I don't want—why don't you start off until [5-24] I get tired of hearing you count. Just count for awhile. Count me one to ten.

A. One, two, three, four, five, six, seven, eight, nine, ten.

Q. Very good and do you know colors? Do you do painting and stuff like that, coloring in school?

A. No audible response.

Q. Yes? You have to tell me yes or no.

A. Um, yes.

Q. Okay, what color is this thing I'm wearing here?

A. Black.

Q. Right. How about this tie I'm wearing, do you know what color that is?

A. Dark red.

Q. Very good. Okay, how about this pad of paper here. What color is this paper?

A. Yellow.

Q. Okay. Do you know A.B.C.'s?

A. No audible response.

Q. Tell me some A.B.C.'s.

A. Sings, a, b, c, d, e, f, g, h, i, j, k, l, m, n, o, p, q, r, s, t, u, v, w, x, y, and z. Now I know my a.b.c's, next time won't you sing with me.

Q. You don't really want me to sing with you do you?

A. No audible response.

[5-25] Q. They call you Drew? Is that your name, is it Andrew or is it Drew or——

A. Drew.

Q. Okay.

A. Not Andrew.

Q. I'm sorry, I didn't know that. Where did you go before you went to the E.C.L.C. kindergarten, Drew? Do you remember, did you go to school or pre-school?

A. I went to Children's World.

Q. Okay, how long—did you go to a school before you went to Children's World?

A. Mrs. Craig's.

Q. Okay. Do you remember when you went to Mrs. Craig's School?

A. Huh?

Q. Do you remember when you were going to Mrs. Craig's School?

A. No audible response.

Q. Yes? You have to say yes or no because what you say is—they have to—we have to know. You're shaking your head, yes, you do remember when you were at Mrs. Craig's School, is that right?

A. No audible response.

Q. Okay. Do you know what it means to tell the truth Drew?

[5-26] A. Yes.

Q. Do you know what it means to tell a lie?

A. Yes.

Q. What's—tell me what the difference is. Is it right or wrong to tell a lie?

A. Wrong.

Q. Okay. Do you know what a lie is?

A. Yes.

Q. If I told you that I was a lady, would I be telling you the truth or telling you a lie?

A. A lie.

Q. Why?

A. Because you're not a lady.

Q. Okay, and it would be wrong for me to tell a lie, is that right?

A. Yeah.

Q. Okay. If you told me that you were a school teacher who taught kindergarten, would that be the truth?

A. A lie.

Q. Why?

A. Because I'm not a teacher yet.

Q. Is it wrong to tell a lie?

A. Yes.

Q. Have you ever told a lie in the past, maybe at home or something like that?

[5-27] A. No.

Q. Okay. You know we're going to ask you some questions here today and you must tell us the truth, do you understand that?

A. No audible response.

Q. And when I finish, the two people behind you over there may ask you some questions, so you must tell them—you must promise me to tell the truth, do you understand that?

A. Yes.

Q. Do you know that it's wrong to tell, in court here today, a lie, do you understand that?

A. Yes.

Q. Okay. Do you know that you're in court here today. Do you know that this is a court house?

A. Yes.

Q. How did you come here today? Did somebody bring you here?

A. I rode in a car.

Q. All right, who drove the car?

A. No.

Q. No, I didn't say you did. I said who did? Do you remember who drove you here?

A. Yeah, my father.

Q. Okay. We're going to ask you some questions about [5-28] when you were at Mrs. Craig's school. Do you know—remember—you know that, do you not?

A. No audible response.

Q. Okay, and will you tell us the truth when we ask you those questions?

A. Yes.

Q. All right. Will you tell us what you remember?

A. Um-hum.

Q. All right. Has anybody told you what to tell me or these other people when we ask you questions?

A. Yes.

Q. Well, what did they tell you to tell me? Did they tell you what answers to tell to the questions?

A. Yes.

Q. What did they—what answers did they tell you to say?

A. Um, who's being mean.

Q. Did they tell you that they were going to ask you who was going to be mean?

A. Yes.

Q. And if you were asked who was being mean, do you know the answer to that question?

A. Yes.

Q. What's the answer?

A. No audible response.

[5-29] Q. You don't want to tell me right now, right?

A. Right.

Q. Well, are you going to answer these ques—are you going to tell me what other people told you to say or are you going to tell me what you remember?

A. Remember.

Q. All right. Well if we asked you a question and are you going to tell us what you remember happening?

A. No audible response.

Q. Yes?

A. Yes.

Q. Suppose somebody told you—if you want to answer a question and—is your answer to a question going to be what somebody told you to tell us or is it going to be what you remember happening?

A. Remember.

Q. Do you remember Miss—when you—you told me you remembered being at Mrs. Craig's School?

A. Yes.

Q. And you know it's important for you to tell me what you remember and not what other people told you to say, do you remember that?

A. Yes.

Q. All right. Did anybody tell you to tell me things that didn't happen?

[5-30] A. No.

Q. And you understand you must tell me the truth, do you understand that?

A. Yes.

Q. And you must tell these other people the truth when they ask you questions?

A. Yes.

Q. And you must tell us what you remember and not what other people told you to say?

A. Yeah.

Q. All right and you're telling me that nobody told you to tell me anything that wasn't true? Did anybody tell you to tell me a lie?

A. No.

Q. Did—who told—when you talked to someone about what was going to—you talked to somebody about the questions that we were going to ask today?

A. No audible response.

Q. Yes?

A. Yes.

Q. Who did you talk to about this?

A. My mother.

Q. Did your mother tell you some of the questions that you would be asked by me and the other people?

A. Yeah.

[5-31] Q. All right. Did she tell you to tell us a lie?

A. No.

Q. Did she tell you to tell us the truth?

A. Yes.

Q. Did she tell you how to answer the questions, tell you the words to say?

A. Yes.

Q. Did she tell you to answer anything or to say anything that wasn't true?

A. No.

Q. That was a lie?

A. Yeah.

Q. Did she tell us—tell you to tell me anything that was a lie?

A. Un-un.

Q. No?

A. No audible response.

Q. And the things that your mother told—was talking about and told you that we were going to ask questions about, do you remember those things?

A. Yes.

Q. All right. Even if someone hadn't told you about them, would you remember them?

A. Yes.

THE COURT: Okay, I'm going to step outside in a [5-32] few minutes and maybe these other people will be back. You can just sit here for a few minutes, okay.

THE WITNESS: Okay.

THE COURT: Just for the record, when this proceeding's going on the only people present in the room is Drew and counsel for the State and the Defendant and myself and the technician who's operating the video camera. I'm going to step outside for a few minutes, okay.

THE WITNESS: Okay.

THE COURT: You can remain there, see you in a little while, okay?

THE WITNESS: Okay.

(Court and counsel leave chambers and go back into the courtroom)

THE CLERK: Stand please.

THE COURT: Have a seat please. Is the sound off Madam Reporter?

THE REPORTER: Yes Your Honor.

THE COURT: Would counsel like to be heard concerning the appropriateness of me hearing from this witness as a competent witness?

MR. KOLODNER: More as to what was (inaudible)—(Unable to hear Mr. Kolodner due to background noise).

THE COURT: Do you want to respond?

MS. O'DONNELL: Your Honor, the State's only response is that it is the State's position that the Judge's, [5-33] your, questioning of the child Drew Woodbury regarding competency was thorough and complete. I believe the Court in its questioning and the answers that Drew gave made it more than clear that Drew knew that he was in court today, to tell the truth and Drew knew that his testimony was to be based on his rememberance and not anything he was told about.

THE COURT: Well, I would decline to question the child further. I've had, as far as I'm concerned, a sufficient opportunity to consider what the child told me to let me decide the issue of competency, but I'll be glad to hear from counsel as to whether they think it's appropriate. I would assume from what Mr. Kolodner is saying that in

the absence of further questioning that—I don't know what that's all about—that in the absence of further questioning—it's the recorder from—they're being buzzed I guess by somebody inside. I'm satisfied I've had sufficient opportunity to garner the facts to assist me in making this decision, but would you want to be heard as to that issue Mr. Kolodner. That is, the appropriateness of me ruling this child to be competent or not.

MR. KOLODNER: Unable to hear.

THE COURT: Sheriff, tell the people to sit down and keep quiet please. Pardon me sir.

Mr. Kolodner: Just to that issue of what—who [5-34] talked to him, what she said (inaudible). I think this should be explored, the amount of time, how many times he was told, the wording of what he was told. The wording—the answers that he was told would be hearsay.

THE COURT: Well, I don't think that goes to the issue of competency, it may go to whatever weight the Court wants to give to it. I'm satisfied, let me say this, that based upon, and over the objection of the defendant, that based upon my questioning of this child, that this child has—does have the ability to communicate with us. That is to understand questions that we are—that I have asked him and that we will ask him and to frame and to articulate and express intelligent answers. I'm further satisfied that the child has a recollection of the incidents with which he is going to testify. That is, the child told me that he does remember Craig's School and he understands that that's the subject matter of his discussion. That he has an independent recollection of that and that although he's been told and given some idea, apparentiy, or told questions that are going to be asked of him today apparently by his mother, that he's going to tell us what he remembers and not what his mother told us to tell him. He's going to tell us the truth. So I'm satisfied that the

child had the capacity to observe and to remember the matters about which he's going to testify and I'm further satisfied that the child does have [5-35] an awareness of his obligation to speak the truth. So I'm satisfied that the child is a competent witness and over the objection of counsel will permit the child to testify.

MS. O'DONNELL: The Sheriff indicates that the room—he believes the room is set up perfectly for the examination.

THE COURT: Okay, well then let's proceed. Mr. Clerk, would you go in—Mr. Clerk—excuse me gentlemen.

(Court speaks to the Clerk)

THE COURT: Counsel, one more thing before you go. Sheriff—never mind the Sheriff's not here. Just instruct the technician any objection pull the plug, then tell me what your objection is and I'll speak to you.

MS. O'DONNELL: I understand.

THE COURT: I guess we better ask the jurors in. Somebody go get the jurors.

(Jury enters courtroom)

(Video tape examination of Drew Woodbury)

BY MS. O'DONNELL:

Q. Okay, Drew, you know me right, I'm Kate O'Donnell. I'm going to be asking you some questions and remember it's very, very important that you answer with the truth, the whole trust and nothing but the truth, right?

A. Right.

Q. Okay, I'm going to ask you first what is—oops, [5-36] excuse me. This man is going to tell you to promise to tell the truth, all right.

A. Okay.

(Witness Sworn)

DIRECT EXAMINATION

BY MS. O'DONNELL:

Q. Drew, what is your whole name?

A. Drew Patton Woodbury.

Q. And how old are you?

A. Five.

Q. And what is your birthday, do you know? What month is your birthday?

A. August the 22nd.

Q. And do you go to school now?

A. Yes.

Q. And where do you go to school?

A. E.C.L.C.

Q. Does that stand for Ellicott City Learning Center?

A. Yes.

Q. And what grade are you in at E.C.L.C.?

A. Kindergarten.

Q. Did you know that you're in a courtroom today, in the Judge's office in a courtroom—in a court house?

A. Yes.

Q. And you know that you have to promise to tell the [5-37] truth, the whole truth and nothing but the truth to the Judge?

A. Yes.

Q. And do you know the difference between telling a lie and telling the truth?

A. Yes.

Q. And do you know you get in big trouble if you tell a lie when you go into the court house?

A. Yes.

Q. Where did you go to school before you went to school at E.C.L.C.?

A. Children's World.

Q. And where did you go to school before you went to Children's World?

A. Mrs. Craig's.

Q. Was Mrs. Craig's school a nice school or a mean school?

A. Mean school.

Q. When you were at that school did you know Mrs. Craig?

A. Yes.

Q. Was she a nice lady or was she a mean lady?

A. Mean.

Q. Did Mrs. Craig ever do anything to you that was mean?

[5-38] A. Yes.

Q. And what did she do?

A. Put something cold in my behinney.

Q. Put something cold in your behinney? Where is your behinney, would you just point to where it is?

(Witness indicates)

Q. Is it back there?

A. Yeah.

Q. Where were you in Mrs. Craig's school when Mrs. Craig put something cold in your behinney?

A. In her office.

Q. How did that make you feel inside when she did that to you?

A. Sad.

Q. Was there anybody in that office besides you and Mrs. Craig?

A. No.

MS. O'DONNEL: Mr. Kolodner, witness with you.

Q. Drew, this man, Mr. Kolodner's going to ask you some questions now, okay?

A. Okay.

CROSS-EXAMINATION

BY MR. KOLODNER:

Q. Drew, where did you say you live?

A. Columbia, Maryland.

[5-39] Q. Do you know the address?

A. No audible response.

Q. That's hard, huh. You can't remember that one can you?

A. Un-un.

Q. Do you play sports at school?

A. Yes.

Q. I bet you're good?

A. I'm good.

Q. What do you play? Do you play ball?

A. Yep.

Q. Are you a pitcher?

A. Yeah, we play baseball and tennis.

Q. Do you play tennis?

A. And soccer.

Q. Oh boy. What are you best at?

A. All three.

Q. You're really good at all three huh, baseball, tennis and soccer, wow.

A. Because I get it right—because I get—because I get the ball right into the net everytime.

Q. You mean when you kick it?

A. Yeah and they'll be kicking it into my net, because I'm—because they kick so hard that I kick even harder than them I just kick it right over the "bam" it gets it [5-40] right—right the gate.

Q. Do you get it past the goalie? Do you have a goalie that plays in our——

A. Yeah, I get it right past the goalie because the goalie is—I'm one of the players.

Q. You're too fast for the goalie, huh?

A. Yeah, yeah, it goes right over the goalie and right into the net.

Q. You play that everyday?

A. Uh-huh.

Q. That's a lot of fun, huh?

A. The bad guys never win.

Q. The bad guys never win, only the good guys, right?

A. Right.

Q. And I think you're one of the good guys?

A. Yes I am one of the good guys.

Q. I could tell that just as soon as I saw you. You look like a good guy. I saw you before looking—the Clerk had a little toy.

A. Whoa.

Q. Wow, you like that huh?

A. No audible response.

Q. Do you believe in Superman?

A. Yes.

Q. Am I Superman?

[5-41] A. No.

Q. If I gave you this toy would you say I was Superman?

A. No.

Q. Okay. You're such a nice fellow, I'm going to give you this toy anyway. It's the one you like, isn't it. I was going to give it to Kate O'Donnell, but I'm going to give it to you. Here you are.

A. (laughter).

MS. O'DONNELL: Drew, would you put it down on the floor until we get finished talking.

BY MR. KOLODNER:

Q. Who brought you here today? Should I call you Andy or Drew?

A. My father and my mother.

Q. They both brought you here?

A. Yeah.

Q. I thought your daddy lived far away?

A. I know, except he came over to my mother's and he—and both of them drived me over here.

Q. Did—have you ever been in this room before?

A. Yes.

Q. How many times have you been in this room before?

A. Three, cause this is my third time?

Q. Really.

[5-42] A. Because the first I had—I was in here two times and this was my third one.

Q. Who brought you here?

A. My father and my mother.

Q. Well, did they tell you you'd have to say some things in this room?

A. Yes.

Q. And who—did anyone else bring you here?

A. No.

Q. And this is—you've been here three times?

A. Yep.

Q. Your mommy told you that you were coming here today, didn't she?

A. (giggles).

Q. You knew all about that, didn't you?

A. No audible response.

Q. And she told you—did she tell you I was going to be here?

A. No audible response.

Q. She did?

A. No audible response.

Q. Did she tell you I was mean or good?

A. Good.

Q. Good. Now did your mommy tell you some of the questions that were going to be asked of you today?

[5-43] A. Yes.

Q. And how many times did she tell you the questions?

A. One.

Q. Well, do you remember any of the questions she told you you were going to be asked?

A. No.

Q. Did she tell you that you were going to be asked about Mrs. Craig?

A. Yes.

Q. All right. Did she tell you that you were going to be asked all about the Craig School?

A. Um, yes.

Q. And did she tell you that Mrs. Craig was mean?

A. Yes.

Q. And did she tell you that Mrs. Craig did bad things?

A. Yes.

Q. And did she tell you that Mrs. Craig did bad things to you?

A. Yes.

Q. How many times did your mommy tell you that?

A. One.

Q. Was that driving over here?

A. No, while I was at home.

Q. Oh, while you were at home. Okay, on the other times that you came to this room, did your mommy tell you the [5-44] same things that Mrs. Craig was mean?

A. Yeah.

Q. And that's when you were in this room before?

A. Yes.

Q. And did your mommy tell you that the Craig School was bad?

A. Yes.

Q. And that bad things happen at the Craig School?

A. Yes.

Q. Now, your mommy told you that?

A. Um-hum.

Q. And that was when you were in this room before, is that right?

A. Yes.

Q. And do you remember how long ago it was when you were in this room?

A. No.

Q. So your mommy told you when you were in this room that Mrs. Craig was bad, right?

A. Right.

Q. And that she did bad things?

A. Yes.

Q. And the Craig School was bad?

A. Yes.

Q. And then she told you again this morning the same [5-45] thing, is that right?

A. Yeah.

Q. Did your daddy tell you the same things?

A. No.

Q. Just your mommy?

A. Yes. He didn't say anything.

Q. So it was just your mommy who told you these things, is that right?

A. Yes.

Q. Did anyone else ever tell you those things?

A. No.

Q. Now, do you remember how long ago you went to the Craig's School? Do you remember when it was?

A. No.

Q. Do you remember—you told—what do you call this lady, Miss O'Donnell or Kate?

A. Kate O'Donnell.

Q. Kate O'Donnell, you told Kate O'Donnell a little while ago that Mrs. Craig put something in your hinney, is that correct?

A. Yes.

Q. Do you know when that happened?

A. After snacktime.

Q. Is that one of the questions your mommy told you was going to be asked of you?

[5-46] A. Yes.

Q. And did your mommy say that Mrs. Craig put something in your hinney?

A. Yes.

Q. Was that this morning that she said that?

A. Yes.

Q. And did she also tell you that on the day that you were in this room before?

A. Yes.

Q. When Mrs. Craig put something in your hinney, did you tell your mommy?

A. Yes.

Q. When did you tell her?

A. The minute before we left.

Q. I don't understand your—Drew, the minute you left where, the school?

A. Home.

Q. I'm talking about on the day that you say Mrs. Craig put something in your hinney, did you tell your mommy that day after school?

MS. O'DONNELL: Objection.

A. Yes.

(sound pulled on video tape)

THE COURT: I'll overrule the objection.

Q. So it was that same day you told your mommy, right?

[5-47] Q. Sometimes little boys don't always tell the truth, do they?

A. No.

Q. And sometimes little boys get punished when they don't tell the truth, isn't that right?

A. Yes.

Q. When you don't tell the truth what does your mommy do to you?

A. No audible response.

Q. Do you forget?

A. No audible response.

Q. All right. Well sometimes you don't tell the truth, isn't that right Drew?

A. No audible response.

Q. Now, you're shaking your head yes, is that right?

A. No audible response.

Q. When don't you tell the truth Drew?

A. No audible response.

Q. You don't like to talk about when you don't tell the truth, do you?

MS. O'DONNELL: Objection, ask to strike.

(Sound pulled on video)

THE COURT: I'll overrule the objection. You can continue.

Q. When's the last time you didn't tell the truth Drew?

A. When I left mrs. [sic] Craig's to go to Children's World.

[5-48] Q. You told a little fib then?

A. Yes.

Q. You know what a fib is, like a lie, huh?

A. Yeah.

Q. Yeah. What lie did you tell then when you left Mrs. Craig's?

A. I'm a girl.

Q. You told someone you were a girl?

A. No audible response.

Q. Have you told some fibs about Mrs. Craig's school?

A. Yes.

Q. When did you tell some fibs about Mrs. Craig's school?

A. At lunchtime.

Q. When today?

A. No audible response.

Q. It's not lunchtime yet, you mean on another day?

A. Yeah on another day when I was at Mrs. Craig's at lunchtime.

Q. Now what lie did you tell?

A. I'm a brick.

Q. Sometimes you imagine that you're other things right?

A. Yes.

[5-49] Q. Sometimes you say you're a brick and sometimes you say you're a girl and——

MS. O'DONNELL: Objection, ask to approach the bench)

(Sound pulled on video tape)

(Counsel leave chambers and approach the bench with the defendant in the courtroom)

MS. O'DONNELL: Your Honor, first I'd ask that at the very least the Court allow me to remove the toy which is obviously distracting Drew from——

THE COURT: That's not apparent to me by the way.

MS. O'DONNELL: There's a toy at the foot—to the left of the chair that the child is reaching down, looking off camera, touching, rolling back and forth. I'd ask that he be given——

THE COURT: I would suggest that Mr. Kolodner just tell the child that I'm going to put the toy in the next room until the case is over, until we're finished or something like that.

MR. KOLODNER: All right, Your Honor.

THE COURT: It's not apparent—I can see the kid playing with the truck now, but it's not apparent on the screen that he was——

MS. O'DONNELL: During the last course of at least [5-50] the past five questions from Mr. Kolodner he was learning to—out of the left side of his chair into the left arm——

THE COURT: Fine.

MS. O'DONNELL: —playing with the toy. It's distracting him.

THE COURT: All right. I would suggest that you, Mr. Kolodner, since you gave him the toy just say, I'm going to take the toy and put it over here until we're finished, okay.

(Counsel leave the courtroom and return to chambers where the questioning of Drew Woodbury continues)

MS. O'DONNELL: May the record reflect that counsel is back in the room after a bench conference.

BY MR. KOLODNER:

Q. Drew, I'm going to have to ask you some questions. Let me just hold the toy and I'll put it down and I promise that I will give it to you after—no, no, let me put it over here. I'll promise I'll give it to you when you leave, okay. This is your toy and you'll get it when you leave, okay, okay?

A. No audible response.

MS. O'DONNELL: Just sit in the chair and listen carefully.

A. I don't know that—we can put these in the back.

Q. Right.

[5-51] A. I didn't throw some legos in the back in case—in case I want—I want—I want—I want that truck to give me some legos. I could just bring them and put legos in them and then make——

Q. What's a lego?

A. Oh, legos are something—is something that you stack on and make something——

Q. What do you make out of legos?

A. A lot of things in my toy or just roll out and give me legos.

Q. Well before you said that sometimes you say that you're a brick, is that right?

A. No audible response.

Q. You're shaking your head yes, is that right?

A. Yeah.

Q. Qnd [sic] sometimes you say that you're a girl, is that right?

A. Yes.

Q. And what else do you say that you are?

A. A house.

Q. Sometimes you imagine you're a house.

A. A telephone, a pencil and a light bulb.

Q. When do you imagine that you're a pencil and a light bulb?

A. Everyday.

[5-52] Q. When do you think that you're a telephone?

A. Everyday.

Q. And when do you think you're a house?

A. Everyday.

Q. Do you tell other people that?

A. No.

Q. You just imagine it in your mind, hum?

A. Yes.

Q. Do you imagine that you're anything else?

A. No.

Q. Did you ever tell your mommy that you thought sometimes that you're a brick or you're a house or a telephone?

A. No.

Q. Did you ever tell her that you were a girl?

A. No.

Q. Do you lie about anything else?

A. No.

Q. Now do you lie about Craig's sometimes?

A. No.

Q. Did you have fun in the hot tub at Craig's with your daddy, hum?

A. Yes.

Q. What's a hot tub?

A. I don't know.

Q. Do you remember the hot tub?

[5-53] A. No.

Q. What fun things did you do at Craig's?

A. None.

Q. Is that one of the questions your mommy told you this morning?

A. Yes.

Q. Your mommy doesn't like Craig's, does she?

A. No.

Q. She told you that didn't she? She told you that didn't she Drew?

A. Yes.

Q. When Mrs. Craig put something in your hinney you said that night you told your mommy, is that right?

A. Yes.

Q. Did you go to school the next day?

A. Yes.

Q. Did you ever tell anyone else that Mrs. Craig put something in your hinney?

A. No.

Q. Just your mommy?

A. Yes.

MR. KOLODNER: I have no further questions.

REDIRECT EXAMINATION

BY MS. O'DONNELL:

Q. Drew, I have a few more questions.

[5-54] A. Okay.

Q. I want you to listen carefully and I want you to remember the promise to tell the truth, the whole truth and nothing but the truth, okay?

A. Okay.

Q. Are you really a girl?

A. No.

Q. Are you really a brick?

A. No.

Q. Is that a pretend thing to say or a real thing to say?

A. A pretend thing to say.

Q. Are you really a house?

A. No.

Q. Are you really a telephone?

A. No.

Q. Are you really a pencil and a light bulb?

A. No.

Q. Your mommy wasn't there when Mrs. Craig stuck something cold up your hinney, was she? She wasn't in the room, was she?

A. No.

Q. How did she find out about it?

A. When she felt it.

Q. How did your mommy find out about it?

[5-55] A. When she feeled the cold.

Q. Did she look at your hinney hole to see if it was okay?

A. Yes.

Q. And the Mrs. Craig (inaudible) was the truth wasn't it? What you told about Mrs. Craig was the truth, wasn't it?

MR. KOLODNER: Objection.

A. Right.

(sound pulled on video)

THE COURT: I'm going to overrule the objection. Again, it's a child. Some degree of leading questions are appropriate. You can ask the child if what he is telling you really happened, etcetera.

BY MS. O'DONNELL:

Q. Did that—or when Mrs. Craig put something cold up your hinney, did that really happen?

A. Yes.

Q. Did you promise to tell the truth about that when you came to court today?

A. Yes.

Q. Did your mommy tell you to tell the truth today?

A. Yes.

Q. Who else told you to tell the truth today?

A. Daddy.

[5-56] Q. Did you tell the truth when you were talking about Mrs. Craig?

A. Yes.

MS. O'DONNELL: No further questions.

RECROSS-EXAMINATION

MR. KOLODNER:

Q. Drew, what did you mean when mommy felt to see if it was cold?

A. No audible response.

Q. Did your mommy put her hand or something in your hinney?

MS. O'DONNELL: Objection.

(Sound pulled on video)

THE COURT: I'll overrule the objection. You may proceed.

Q. She put her foot in your hinney?

A. Uh-huh.

Q. When was this?

A. The day—a day when Mrs. Craig put something cold in my behineey.

Q. Let me ask—and that night you told her that Mrs. Craig had put sor thing in your hinney and then your mommy put her foot in your hinney?

A. No sudible [sic] response.

Q. Had your mommy ever put her foot in your hinney [5-57] before?

A. No audible response.

Q. She had and how often had she done that, a lot of times?

A. No audible response.

Q. Five? Five times?

A. Yes.

Q. Had anyone else at your house put something in your hinney?

MS. O'DONNELL: Objection.

A. No.

THE COURT: I'll overrule the objection.

Q. Just your mommy had put something in your hinney, is that right?

A. No, just Mrs. Craig.

Q. But your mommy five times put her foot in your hinney, is that what you're saying?

A. Yes.

Q. Did it hurt you when she put her foot in your hinney—her foot in your hinney?

A. No.

MR. KOLODNER: I have no other questions.

REDIRECT EXAMINATION

BY MS. O'DONNELL:

Q. Drew, are you getting tired of answering questions?

[5-58] A. Yes.

Q. Are you getting silly?

A. No audible response.

MS. O'DONNELL: No further questions.

MR. KOLODNER: I guess it will be okay for the toy.

(End of video tape testimony by Drew Woodbury)

(Counsel enter the courtroom)

THE COURT: Counsel, I would, since the examination of the witness is concluded I would propose to turn the video's off. Any objection to that?

MR. HIRT: No objection Your Honor.

MR. WARFIELD: Yes sir. No objection.

• • •

[5-91] (Competency qualification of Jessie Sue Smith by the Court in chambers via video tape)

COMPETENCY QUALIFICATION

BY THE COURT:

A. Jessie.

Q. Jessie?

A. Jessie Sue Smith.

Q. And just so it's understood, we're in the presence of the counsel and the technician, I'm going to ask Jessie Sue some questions. How old are you Jessie Sue?

A. Four.

Q. Do they call you Jessie?

A. Yeah.

Q. Okay, you're four years old?

A. Um-hum.

Q. Do you go to school?

A. No.

Q. You don't.

A. I go to a babysitter.

[5-92] Q. You go to a babysitter?

A. Um-hum.

Q. Did you used to go to school?

A. Yes.

Q. Do you have any brothers and sisters?

A. Yes, I have Grayson, my little brother.

Q. Grayson?

A. Um-hum.

Q. How old is he?

A. He's two.

Q. Oh, you're older than he is, right?

A. Um-hum.

Q. Okay. Who else lives at home with you Jessie?

A. My mom and dad and I don't have anymore brothers or sisters.

Q. Okay. You go to a babysitter during the daytime?

A. Um-hum.

Q. What's her—his name or her name?

A. Her name is Martha.

Q. Martha?

A. Um-hum.

Q. You go there everyday?

A. Every school day I go.

Q. Every school you go?

A. Um-hum.

Q. What do you do at Martha's house?

[5-93] A. I play.

Q. Do you go to Martha's house?

A. Um-hum.

Q. You play?

A. Um-hum.

Q. Do you play with numbers and books and crayons and stuff like that?

A. Um-hum.

Q. What do you do when you go to Martha's house?

A. She has two little girls—she has one little boy and girl.

Q. Do you play with them?

A. Um-hum.

Q. How old are they?

A. Um, I don't remember.

Q. Are they bigger than you are, or smaller?

A. They're bigger than I am.

Q. Do you know your numbers or your letters or your A.B.C.'s and——

A. I know my A.B.C.'s, but I don't know my numbers and letters.

Q. You know your A.B.C.'s?

A. Um-hum.

Q. Would you tell me some of them?

A. Okay. Sings, a,b, the whole thing?

[5-94] Q. Sure if you can.

A. Okay. Sings, a.b.c.d.e.f.g.h.i.j.k.l.m.n.o.p.q. r.s.t.u.v.w.x.y and z.

Q. Very good. Try and speak a little louder. Pretend you're shouting at me so we can hear you, okay?

A. Okay.

Q. Do you know colors?

A. What?

Q. Do you know colors?

A. Uh-huh.

Q. What colors do you know?

A. Pink and brown and white and gold and silver and——

Q. Do you see anything—what color is this robe I'm wearing?

A. Black.

Q. Right, and what color is my tie?

A. Red, redish-brownish.

Q. What color is this piece of paper here?

A. White.

Q. That's right, that's a white piece of paper. What color is that ribbon on your dress?

A. Right here?

Q. Yes.

A. Pink.

Q. Okay, good. You don't know your numbers yet, do you?

[5-95] A. Un-un.

Q. Before you went—is it Miss Martha, is that her name?

A. Yeah.

Q. Okay. Before you went to Miss Martha as a baby-sitter, did you go to school before that?

A. Um-hum.

Q. Where did you go?

A. Children's Garden.

Q. Children's Garden?

A. Um-hum.

Q. How long did you go there, do you remember?

A. Un-un.

Q. And what did you do at Children's Garden?

A. I played with the other children there. I had one more—I had one little friend and her name was Alexa.

Q. Alexa, she was your good friend at Children's Garden?

A. Um-hum.

Q. Did you go to pre-school or anything like that before you went to Children's Garden?

A. I didn't hear what you said.

Q. Before you went to Children's Garden did you go to any othe [sic] place?

[5-96] A. Un-un.

Q. Did you go to pre-school or nursery school or anything like that?

A. I went to a bad school.

Q. What school was that?

A. Where I got hurt.

Q. Where you got hurt?

A. Um-hum.

Q. Do you know the name of that school?

A. I forget what it's called.

Q. Do you remember going to that school?

A. Um, um-hum. There was a bad boy there that hurt me.

Q. A bad boy?

A. Um-hum.

Q. Do you know some of the teachers at that school?

A. Um-hum.

Q. What were their names?

A. I have to think.

Q. That's all right, take your time.

A. I forget.

Q. You don't remember?

A. No.

Q. Do you remember any of the people who—any of the people who helped working there?

[5-97] A. Un-un.

Q. What was the boy's name, do you remember?

A. Un-un.

Q. Do you know the difference between telling the truth and telling a lie?

A. Um-hum.

Q. What's the difference, what's—what's a lie?

A. A lie is if you tell your—if you tell somebody that you have flowers in your garden and you really don't, that's a lie. The truth is if you really have flowers in your garden, that's the truth.

Q. Right.

A. But I don't.

Q. You don't have flowers in your garden?

A. I'm going to grow—I'm going to grow some someday.

Q. Okay. If I told you—is it—is it wrong to tell a lie?

A. What?

Q. Is it wrong to tell a lie?

A. Um-hum.

Q. Is it good to tell a lie?

A. No.

Q. If I told you that I was a lady would I be telling you the truth?

[5-98] A. A lie.

Q. Why?

A. Because you aren't.

Q. Okay, and if I said that you were a school teacher who taught the third grade at school, would that be the truth?

A. It would be a lie.

Q. Okay. If you told me that you went to high school and you went on a school bus and you went to high school, would that be tel—would you be telling me the truth?

A. A lie.

Q. Is it wrong to tell a lie?

A. Um-hum.

Q. Do you understand that we're going to ask you some questions here today?

A. Um-hum.

Q. Yes?

A. Um-hum. You know what?

Q. What?

A. Mu mom said nobody's allowed to take a picture of me.

Q. Is that right?

A. Uh-huh.

Q. Do you know that this man's taking your picture?

A. Um-hum.

[5-99] A. But my mom won't allow anybody to.

Q. Okay. Well, do you know that this man's taking your picture now.

A. No.

Q. That's just a camera, that's not like a—that's like a moving picture camera, that's not like a camera with a flashbulb, okay.

A. I know.

Q. Did your mom tell you why you were coming here today?

A. Um-hum. To talk about what the bad boy did to me.

Q. Did anything else happen to you at that school where the bad boy was?

A. Um-hum, um-hum. Do you know what he did to me?

Q. No what did he do to you?

A. Oh, my mom told me is all I'm going to talk about is the lady with the two thumbs.

Q. The lady with the two——

A. Um-hum, thumbs.

Q. Okay. Who was the lady with two thumbs?

A. I forget her name.

Q. Well, where did you ever meet her.

A. At the bad school.

Q. Was she there?

[5-100] A. Um-hum.

Q. Do you remember what happened at the school?

A. Yeah. You know what, she did something mean to me. She almost—she tried to kill me.

Q. She did?

A. Uh-huh. But I ran away. I ran into the school so she couldn't kill me.

Q. Do you remember that happening?

A. Um-hum.

Q. Did your mom—did you come today to this building with your mom?

A. Um-hum.

Q. Did she tell you what to tell me?

A. Yeah—no she didn't.

Q. Well, what did she say. Did she say you were going to come in and talk to a Judge?

A. Um-hum. She said I'm going to talk to the Judge.

Q. Did she tell you how to answer the questions?

A. Un-un.

Q. Well, if I ask you some questions and if these two people ask you questions about——

A. Am I supposed to talk into here?

Q. Oh, you can talk pretty close. This man's listening to what you say, so if you don't talk loud enough, he's going to tell us, okay?

[5-101] A. Okay.

Q. Do you remember going to that school with the lady with two thumbs?

A. Um-hum, yes.

Q. Are you going to tell us what you remember?

A. Um-hum.

Q. Is what you tell us going to be true?

A. Um-hum.

Q. Is it going to be the truth?

A. Yes.

Q. Do you know—do you understand you must tell me the truth? ——

A. Um-hum, yes.

Q. And when these other two people here ask you questions you must tell them the truth?

A. Yeah. I don't tell lies.

Q. Is it wrong to tell lies?

A. Um-hum.

Q. Do you like—have you ever told a lie?

A. No.

Q. Never.

A. Never.

Q. And are you going to tell us what you remember?

A. Um-hum.

Q. Did anybody tell you to tell us something that [5-102] wasn't true?

A. No.

THE COURT: Okay, Jessie, thank you. Just a minute. I'm going to have to go outside and talk to these two people for a few minutes. You can stay in here, okay?

THE WITNESS: Okay.

THE COURT: And we'll be right back in a few minutes.

(Sound pulled on video)

(Court and counsel return to the courtroom and counsel and the defendant approach the bench and the following ensued)

THE CLERK: Stand please.

THE COURT: Have a seat please.

MS. O'DONNELL: Your Honor, I assumed you wanted to see us at the bench.

THE COURT: Would counsel like to approach the bench.

MR. KOLODNER: Yes sir.

THE COURT: Go ahead. Does anybody want to be heard or—Mr. Kolodner or——

MS. O'DONNELL: The State feels that the voir dire of Jessie Sue Smith by the Court was sufficient.

THE COURT: Sir.

MR. KOLODNER: No comment.

[5-103] THE COURT: Based upon my questioning of the child in chambers I am satisfied that the child did communicate intelligently with us. That she has the ability to understand the questions that were asked of her and that she has the ability to frame and express answers. I'm satisfied that she has a recollection of the incidents which—with which she's been called to testify and to remember the matters about which testimony, obviously, is sought of her. I'm satisfied that she is aware of her obligation to speak the truth and to answer questions truthfully. So for those reasons, I am satisfied and have determined that the child is competent to testify as a witness.

There is the issue as I understand it before us of the appropriateness, as I recall it, of the Court receiving this child's testimony based upon my prior ruling that the testimony of children with reference to other crimes has to be substantiated by physical evidence. As I understand the proffer is, not proffer because I read the report of the physician, Dr. Shubin when it was submitted today——

MR. KOLODNER: As to the vagina area.

THE COURT: —as to vaginal injury, so that if there is no evidence offered of that fact, then of course it wouldn't be appropriate to receive this evidence at this time. So the only mechanism that I know is to out of the presence of the jury, send you all back there. I will remain [5-104] here with counsel and have you question the child concerning that issue.

MR. WARFIELD: Could I ask a question procedurally?

THE COURT: Yes.

MR. WARFIELD: If Ms. O'Donnell elicits that information, would the child then out of the presence of the jury be subjected to the cross-examination of the defense attorney, or would that be—would that stop there. I would

submit it would be inappropriate at that point for the defense attorney to cross-examine because the foundation would have been laid to allow it to come to the jury and then he would begin his full scope of cross-examination at that time.

THE COURT: Do you want to respond to that Mr. Kolodner.

MR. KOLODNER: Well first I would like to place on the record my objection to this child's testimony being taken on closed circuit television as——

THE COURT: For the reasons that you've——

MR. KOLODNER: —that I've previously stated. In addition to that I also object to this particular testimony being accepted because from the discovery that has been submitted to me, the child states as to this defendant, that there was an injury to her anus by this defendant. However, the medical reports submitted to confirm or to [5-105] substantiate that injury is to the vagina and show a normal anus. Therefore in the absence of medical testimony to substantiate the allegation made by, what I believe to be the testimony of the child, that her testimony should not be received as her testimony is only substantiated by another individual causing damage to the vagina and that medical report is the only medical report that the State has produced.

THE COURT: Of course, we don't know what the child's testimony is going to be and that's why we're using the safe guard of taking the child's testimony out of the presence of the jury.

MS. O'DONNELL: Which was the request, I might add, of the State and the State had brought those concerns to the Court's attention.

THE COURT: Yes.

MR. KOLODNER: But I just wanted——

THE COURT: I would think that if the State believes that it has elicited sufficient information on direct examination to get over that hurdle, the State should then ask to approach the bench and have me rule whether I believe the issue's properly before the jury, absent cross-examination. If the State doesn't get over that hurdle we obviously don't question the child further.

MS. O'DONNELL: Right, Your Honor, and as I also [5-106] —I understand that, and as I also mentioned yesterday in chambers with counsel and the Court and this morning again, I am going to direct, as I have stated, the child's testimony to relate only to this defendant. It is not the State's thought or nor should the State be penalized because this child's been allegedly abused by more than one person. However I will direct her testimony as I've stated and as she's stated to Your Honor to questions relating to the lady with the two thumbs. I have not purposefully brought this child in here to elicit information about anyone else (inaudible)

THE COURT: We would hope that she wouldn't relate that and it would seem to me that if she testifies to that out of the jury's presence, I would permit you to say we're not here to talk about that today.

MR. KOLODNER: I won't note any objection then if it will just be——

MS. O'DONNELL: I'm trying to make it as fair for the defense as I can Your Honor.

THE COURT: Let's see what happens.

MS. O'DONNELL: Thank you.

MR. WARFIELD: But I think the Court did note that she did bring that subject up spontaneously in the——

THE COURT: I understand and perhaps it would seem to me appropriate with some indulgence from the

defendant [5-107] to allow the State when they question her to say, we're not here to talk about that particular subject.

MS. O'DONNELL: Yes Your Honor. As I've stated before I have—it's been the only attempt I have to limit the scope of her questioning. I have not in any other way tried to control her.

THE COURT: Let's see what happens.

MR. WARFIELD: In all due caution, in cross-examination context then if it gets before the jury, again there's—it's possible that as a response to a question by defense counsel on and with no intent, obviously, that that subject could be raised. I mean, I don't think Ms. O'Donnell has a right to constantly intervene, but I'm saying perhaps Mr. Kolodner as well should be asked to also do that when he's asking the questions.

THE COURT: I would assume that neither of you would intentionally bring up some——

MS. O'DONNELL: No.

MR. WARFIELD: But in the broad context it could come in if you asked her has anybody said anything——

THE COURT: I guess all things are possible. If that happens, we have to be prepared to address it.

MR. WARFIELD: But all I'm asking the Court is that if Mr. Kolodner in his questioing—his cross-examination could do the same.

[5-108] THE COURT: I assume it's understood.

MR. WARFIELD: Thank you.

(Counsel and the defendant return to trial tables and the following ensued)

MS. O'DONNELL: Your Honor, with the Court's permission, Mr. Kolodner and I will return to the chambers.

(Ms. O'Donnell and Mr. Kolodner return to the Judge's chambers to question Jessie Sue Smith outside of the jury's presence)

(Video tape examination of Jessie Sue Smith)

BY MS. O'DONNELL:

Q. Okay Jessie Sue, this man is the Clerk, he's going to ask you to take a promise to tell the truth.

A. I am.

(Witness Sworn)

DIRECT EXAMINATION

BY MS. O'DONNELL:

Q. All right Jessie Sue, I'm going to ask you some questions, okay?

A. Okay.

Q. And I want you to remember something very important.

A. Okay.

Q. We're going to talk about the truth——

A. Okay.

Q. —the whole truth, and nothing but the truth——

[5-109] A. Okay.

Q. Do you understand that?

A. Um-hum.

Q. Do you promise to tell the truth?

A. Uh-huh.

Q. And we're going to talk about the lady with two thumbs?

A. I know.

Q. —okay. We're not going to talk about anybody else today.

A. I know.

Q. Okay?

A. Okay.

Q. So when you answer questions you talk only about the lady with two thumbs, okay?

A. Okay.

Q. How old are you?

A. Four.

Q. And do you remember going to a school where the lady with two thumbs was?

A. Yes.

Q. Was that a nice school or a bad school?

A. A bad school.

Q. What job did the lady with two thumbs have at that school?

[5-110] A. To try to kill—to um, be mean to children.

Q. Did the lady with two thumbs ever be mean to you?

A. Yes.

Q. Now I want you to tell us just what the lady with two thumbs did that was mean to you, okay?

A. Okay.

Q. Did she ever hurt your body?

A. Yes.

Q. Where did she hurt your body?

A. Right in—right here.

Q. Where are you pointing to? What is that part of your body called?

A. I don't want to——

Q. You don't want to say it. Well you have to say it, if you think it has a name.

A. It does.

Q. What is that part called?

A. I don't feel like saying it.

Q. How many places do you have down there?

A. Down where?

Q. Where does—tell me about all the things that the lady did—all the places where the lady (interference in microphone)

A. In the woods and—it's always in the woods.

Q. Well, where on your body did you get touched by [5-111] the lady with two thumbs.

A. Right there.

Q. You told me two places.

A. Um-hum.

Q. You told me right in the front and right in the back. Do they have a name? We need to use names.

A. Um.

Q. Do you call that place in the front your box?

A. Um-hum.

Q. And what do you call the place in the back?

A. Um, um, I don't want to say it because it's too private.

Q. Too private?

A. Um-hum.

Q. If I say it first, do you thing you can say it after that——

A. Okay.

Q. —(inaudible). Do you call that your butt?

A. Um-hum.

Q. What did the lady with two thumbs touch your box with Jessie Sue?

A. Um, with a stick.

Q. And what did she touch your butt with?

A. A prickly stick.

Q. Try and use that microphone, okay.

[5-112] A. Okay.

Q. Just answer questions.

A. I was trying to get this thing on——

Q. Just leave it like that.

A. Okay.

MS. O'DONNELL: I don't have anymore questions for you.

A. You don't

MS. O'DONNELL: Not right this minute. We're going to come back and ask you some more questions again, okay.

A. Okay.

MS. O'DONNELL: But we have to go talk to the Judge for one minute, okay?

A. Okay.

MS. O'DONNELL: And you sit there and just be very good——

A. Yeah.

MS. O'DONNELL: —and we'll be right back.

(Counsel leave chambers and return to the courtroom)

(Counsel and the defendant approach the bench and the following ensued)

THE COURT: Madam State's Attorney.

MS. O'DONNELL: Your Honor——

THE COURT: The State believes it has set a [5-113] foundation to elicit testimony from this witness.

MS. O'DONNELL: It has, I believe so Your Honor.

THE COURT: Okay. Do you want to respond Mr. Kolodner.

MR. KOLODNER: If it please the Court, I've gone through pages and pages—and I heard what this witness said, but I have read pages and pages of writings dealing with this witness and no place can I find that up until just now did she say that anything was ever placed in, as she calls it, the box, the only refer—by this defendant. The only place that she makes reference in the writings that I have is her rear. I heard what she said in here——

THE COURT: These writings that you have were provided——

MR. KOLODNER: By the discovery by the State.

THE COURT: These are her writings or writings of what she told others.

MR. KOLODNER: Of what she reports to others.

THE COURT: Well, it seems to me—I'm sorry. Had you——

MR. KOLODNER: And that's the basis for my objection. Today she says that she was touched in both places.

THE COURT: Obviously it's subject—her testimony is subject to cross-examination, but I'm satisfied there is a nexus between her testimony today and the physical findings [5-114] of the physician, of Dr. Shubin, who I believe conducted the examination to at least satisfy me that her testimony today is supported by physical facts, physical findings which would be at least consistent with my prior ruling on this type of testimony. Again, all of her testimony is subject to cross-examination, but I'm satisfied that the doctor who found evidence of vaginal injury, that that finding is consistent with this witnesses [sic] testimony and for that reason it should be received, again, subject to cross-examination.

Mr. Clerk, I ask you in the presence of the jury to again swear the witness in.

(Counsel return to trial tables and the following ensued)

(Ms. O'Donnell and Mr. Kolodner return to the Judge's chambers for examination of Jessie Sue Smith in the jury's presence)

(Jury enters courtroom)

(Video tape testimony of Jessie Sue Smith)

(Witness Sworn)

DIRECT EXAMINATION

BY MS. O'DONNELL:

Q. Okay Jessie——

A. Um-hum.

Q. Talk loud enough so that——

A. I'm sorry.

[5-115] Q. —I can hear you, okay?

A. Okay.

Q. How old are you?

A. Four.

Q. And what is your whole name?

A. Jessie Sue Smith.

Q. And do you know what the difference is between telling the truth and telling a lie?

A. Yes.

Q. What does it mean to tell the truth?

A. It means that um, that um—it means that (inaudible)

Q. Sit back in your chair. If I said that I was a man, would I be telling the truth or would I be telling a lie?

A. A lie.

Q. If I said that you had a bald head, would I be telling the truth or would I be telling a lie?

A. A lie.

Q. If I said that you had on a pink flowered dress would I be telling the truth or would I be telling a lie?

A. A lie. Do you know what.

Q. Sit still so we can understand your answers.

A. You know what. I have a flowered dress that has pink flowers on it. I do.

Q. Now listen very carefully to my questions.

[5-116] A. Okay.

Q. Do you promise to tell the truth?

A. Yes.

Q. Is it good to tell a lie or is it bad to tell a lie?

A. Bad—bad to tell a lie.

Q. What happens to you if you tell a lie?

A. You can get in trouble.

Q. And when you come to court to talk to the Judge is it good to tell a lie or is it bad to tell a lie?

A. Bad to tell a lie.

Q. And do you promise to tell only the truth?

A. Yes.

Q. Do you promise to tell only what you know to be the truth?

A. Yes.

Q. And do you promise to tell only what you really remember?

A. Yes.

Q. Where do you live? Do you know your address?

A. No.

Q. Where do you live—do you know—if you were going to tell me—if I were to take you home, where would I go?

A. Um——

[5-117] Q. Do you know?

A. You would—I don't know.

Q. Do you know the name of the road that you live on?

A. Uh-huh, Carved Stone.

Q. Carved Stone.

A. Um-hum.

Q. Who do you live with?

A. My mommy and daddy and Grayson my little boy?

Q. How old is Grayson your little brother?

A. Two.

Q. And when was he two years old?

A. I didn't hear what you said?

Q. When was he two years old?

A. Um.

Q. When's his birthday?

A. I don't know.

Q. When is your birthday?

A. April 2nd.

Q. And how old will you be on your next birthday?

A. Um, (inaudible)

Q. Okay, how old are you now?

A. Four.

Q. And how old will you be on your next birthday?

A. (inaudible).

Q. Count the numbers. What are the numbers (inaudible).

[5-118] A. I'll be five.

Q. Do you go to school now or do you not go to school now?

A. I don't go to school now.

Q. Where do you go during the day with your mom and dad at work?

A. I play. When mommy and dad are at work I have to go to the babysitters.

Q. And what's your babysitter's name?

A. Martha.

Q. And how many kids go to Martha's to get—for babysitting besides you?

A. There's one boy.

Q. And what's his name?

A. Jonathan.

Q. Does Martha have any children of her own?

A. Yes.

Q. What are they're names?

A. Amy and Willy.

Q. Are Amy and Willy older than you or younger than you?

A. Older than me.

Q. What is the other little boy's name that goes there to be babysat?

A. Jonathan.

[5-119] Q. Jonathan?

A. Yes.

Q. Is he older than you or is he younger than you?

A. He's the same as me. He's four too.

Q. Before you went to Martha's where did you used to go during the day when mommy and daddy would be at work?

A. I didn't hear you.

Q. Did you ever go to school before?

A. Yes.

Q. Where did you go to school before?

A. Child's Garden.

Q. And before you went to Child's Garden, did you go to another school?

A. Yeah, but that was a bad school.

Q. Do you remember the name of the bad school or do you not remember the name of the bad school?

A. I don't remember the school—name. I don't remember.

Q. When you were at the bad school, was there a lady there with two thumbs?

A. Yes.

MR. KOLODNER: Objection.

(Sound pulled on video)

THE COURT: I'll overrule the objection.

Q. I'm going to ask you some questions only about that [5-120] lady with the two thumbs, okay?

A. (inaudible) of talking.

Q. Okay, just sit quiet now. I'm going to be asking you some questions and you can listen carefully, okay?

A. Okay.

Q. Was the lady with two thumbs at that school nice or was she bad?

A. Um, bad.

Q. Did that lady with two thumbs ever touch you?

A. Yes.

Q. Where did she touch you?

A. Sometimes she touches me in my private places.

Q. In your private places?

A. Yes.

Q. Where are your private places?

A. Right here and right here (indicating).

Q. Would you stand up and show me a little better where they are? Do they have names?

A. Yes.

Q. Tell me about where the—what the lady with two thumbs, where she touched you in your private places?

A. I showed you.

Q. You showed me?

A. Uh-huh.

Q. What did she touch you with?

[5-121] A. Um her hand.

Q. And where did she touch you with her hand?

A. What?

Q. Where did she touch you with her hand?

A. In these places.

Q. In the front place and in the back place you're pointing to?

A. Um-hum, yeah.

Q. Did she use anything when she touched you there?

MR. KOLODNER: Objection.

A. Un-un.

(Sound pulled on video)

THE COURT: I'll overrule the objection.

Q. Well, tell me what—tell me exactly what the lady with the two thumbs did?

A. Do I have to tell you?

Q. You have to tell me right now——

A. Okay.

Q. —and talk into the microphone.

A. Um, I forget.

Q. Where exactly—tell me what the lady with two thumbs did?

A. She um, sometimes she tries to take me to her house and steal me.

Q. Tell me about the place that she touched you?

[5-122] A. I did.

Q. How did it feel?

A. Yucky.

Q. When the lady with two thumbs touched you in the front place, what did that feel like?

A. It feeled yucky too.

Q. And where were you when that happened?

A. In the forest.

Q. Where was that forest?

A. Um, where these—where these big trees are, those big trees.

Q. Where were you when the lady with two thumbs touched you in the back place?

A. Know what she did—know what—what—know what the lady with two thumbs and the bad boy did to me?

Q. Tell me about the lady with two thumbs, okay?

A. Know what the lady with two thumbs did to me?

Q. What?

A. Buried me under the ground in a cage. But I—a teacher got me out.

Q. What did the lady with two thumbs call you?

A. What?

Q. What—what kind of words did the lady with two thumbs use?

MR. KOLODNER: Objection.

[5-123] A. Bad, bad.

(Sound pulled on video)

THE COURT: I'll overrule the objection.

Q. What were those words?

A. They're bad words and I don't want—I'm not allowed to say them.

MS. O'DONNELL: Witness with you.

CROSS-EXAMINATION

BY MR. KOLODNER:

Q. That's a real pretty dress you have on.

A. Thanks.

Q. You say you have one that has flowers on it too, don't you?

A. Um-hum. This one has little pink flowers.

Q. Does that one have pink flowers?

A. Um-hum. little ones. One, it has blue flowers and one has pink flowers.

Q. You have a lot of dresses, don't you?

A. Um-hum.

Q. Your shoes are pretty too.

A. Thank's. They're a little bit dirty though. A person (inaudible) polish them, but dad never does.

Q. Did you know that I was going to be here today?

A. No.

Q. No one told you that, that I was going to be here

[5-124] A. No.

Q. Have you ever been in this room before?

A. Um, yes.

Q. Do you remember when you were in this room before?

A. Yes.

Q. When?

A. Um, the first time I came here.

Q. I see. Were you here another time?

A. Yes.

Q. And this is another time?

A. Yes.

Q. How many times is that, three times?

A. No two times.

Q. Two times?

A. I've been here two times.

Q. Who brought you to this room?

A. My mother and um, um, I forget, Kate.

Q. Do you remember when that was?

A. Um, no.

Q. You know how to count real good. How many times did you say you were here?

A. Two times.

Q. Two times?

A. No audible response.

Q. And when you came in before you saw a doll, didn't [5-125] you?

A. Um-hum.

Q. I brought this doll here for you because I want to be your friend and I want you to be my friend?

A. Okay, okay.

Q. Want to be my friend?

A. Okay.

Q. Would you like to have this doll?

A. I think so.

Q. Okay, that's your's[sic], okay?

A. You know what, I have a purple bear too and I have a little donkey too.

Q. You have a purple bear?

A. I was wondering why that was there.

Q. You were wondering why that was there?

A. Yes.

Q. Well it was there because you're such a good girl.

A. Thank you.

Q. Now——

MS. O'DONNELL: Jessie Sue, would you put that on the floor until you're finished answering questions and listening please.

Q. When you leave you can take it with you, okay?

A. Okay.

[5-126] Q. Now, what—what was the last school that you went to?

A. Um. Children's Garden.

Q. Did anyone touch you there?

A. No. It was fun at Children's Garden but not at the school I just went to.

Q. When—who brought you to court today?

A. My mom and dad.

Q. Did your mommy tell you——

A. Oh, and somebody else did.

Q. Who?

A. Um. let me think. What was her name. Nancy.

Q. Who's Nancy?

A. My friend, but she's—but she's a grown up.

Q. Did your mom—I see. Did your mommy tell you what questions we were going to ask you today?

A. No.

Q. Did anyone tell you what questions we were going to ask you today?

A. No.

Q. Your mommy doesn't like Craig's School, does she?

A. No.

Q. She told you she doesn't like Craig's School, didn't she?

A. Um-hum.

[5-127] Q. Does she call it a bad school?

A. Uh-huh.

Q. I can't hear you.

A. Yes, she calls it a bad school.

Q. She doesn't like Mrs. Craig either, does she?

A. No.

Q. What does she call her?

A. Um, my mom——

Q. Does she call her bad?

A. She calls her the lady with two thumbs because she's got two thumbs.

Q. What does she call her?

A. The lady with two thumbs because she has two thumbs.

Q. She calls her the lady with two thumbs?

A. Yes.

Q. Did your mom tell you that—your mommy tell you that she was the lady with two thumbs?

A. Yeah.

Q. When did your mommy tell you that?

A. When I first got—I mean, I told my mommy that.

Q. When did your mommy first tell you that she was the lady with two thumbs?

A. When I first went there.

Q. Does anyone else call her the lady with two thumbs except your mommy?

[5-128] A. My dad does.

Q. Just your mommy and your dad?

A. Um-hum.

Q. Do you know anyone else that calls her that?

A. No.

Q. Your daddy doesn't like Craig's School either, does he?

A. No.

Q. Huh?

A. No.

Q. Does he call Craig's School bad?

A. Yes.

Q. When did he tell you that Craig's School was bad?

A. I told my daddy that.

Q. When the lady with two thumbs touched you, where did she touch you?

A. In my private places. I've got a itchy. I've got itchy right here. Sometimes I itch right there.

Q. Would you tell me again where the lady with two thumbs touched you?

A. Right here and right there (indicating)

Q. And you call the front—what do you call the front?

A. Your box.

Q. And what do you call the back?

[5-129] A. Your butt.

Q. Okay. Now what did she touch you with, her hand?

A. Yeah.

Q. When you don't tell the truth, what does your mommy do to you?

A. She—I get in trouble and I have to sit in the "time out" chair.

Q. You have to do what?

A. Sit in the "time out" chair.

Q. Oh, you have a "time out" chair?

A. Yeah.

Q. What's that. A little chair that you have to stay in?

A. It's a rocking chair.

Q. It's a rocking chair.

A. Um-hum.

Q. Is that when you don't tell the truth?

A. Yeah, but I tell the truth all the time.

Q. When did you have to sit in the "time out" chair.

A. Know what, I even have to sit in the "time out" chair when I—even sometimes when I be mean to my little brother, I have to sit in the "time out" chair.

Q. Is that the punishment chair?

A. Yeah, but I don't hurt Grayson, my little brother, anymore.

[5-130] Q. Did you used to try to hurt him?

A. No. Not like the bad boy did to me.

Q. When Grayson was born, you didn't like him, did you?

A. I did.

Q. Did you?

A. Um-hum.

Q. Oh, I thought you didn't like him. You liked him there?

A. Yeah.

Q. Now when is the last time you told something that wasn't true?

A. I didn't even—I don't even tell lies.

Q. You don't tell lies?

A. No.

Q. Well, did the lady with two thumbs try to kill you?

A. Uh-huh.

Q. When did she try to kili you?

A. When I first went there.

Q. And did you tell your mommy?

A. Yes.

Q. When did you tell your mommy?

A. I mean, I don't remember.

Q. Well, your mommy would pick you up at school, wouldn't [5-131] she.

A. Yes, but I don't go to school anymore.

Q. Now when you did go to the school where the lady with two thumbs was, did your mommy pick you up?

A. Um-hum.

Q. Okay, and the lady with two thumbs tried to kill you, is that right?

A. Yeah.

Q. Did you tell your mommy that?

A. Um, you mean when I first went there?

Q. Yes.

A. No, I forgot. I don't remember if I did or not.

Q. Well, if she tried to kill you wouldn't you get scared?

A. Yes.

Q. And wouldn't you tell your mommy if you were scared?

A. No.

Q. You don't remember if you told your mommy or not, huh?

A. No, I don't remember.

Q. Did the lady with two thumbs bury you under the ground?

A. Yes.

Q. What did she do, dig up the dirt?

A. Yeah and she buried me up into a hole. Then she [5-132] did another thing. She digged a hole and whoever walks in it can fall in there.

Q. What did she do, she dug a hole in the ground?

A. Yeah so if somebody falls in there she can get them. But never—everybody watches out and nobody fell in it.

Q. Well then did she put you in the hole?

A. No, no. I mean, yes.

Q. She did?

A. Yeah.

Q. And did she cover you with dirt?

A. No.

Q. You said that somebody saved you. Who saved you?

A. One of the teachers but I don't remember the teacher's name.

Q. Were you lying in the hole?

A. What?

Q. The hole the woman with two thumbs dug, were you placed in that hole?

A. Yes.

Q. And how long were you in the hole?

A. Um, um, for three hours.

Q. For three hours?

A. Um-hum.

[5-133] Q. How do you know that you were in the hole for three hours?

A. Because I was a smart little girl?

Q. You're a smart—oh, I know you're a smart little girl and were you in the hole by yourself?

A. Yeah.

Q. Were there rocks down there?

A. Yeah.

Q. A lot of rocks?

A. Yeah.

Q. Were the rocks on top of you or were you under them or were the rocks next to you?

A. The rocks were next to me.

Q. Okay. Tell me all about that. How did that happen? Did the lady with two thumbs take you someplace?

A. Yes.

Q. Where did she take you?

A. Um, to the grocery store but she brought me back.

Q. She took you to the grocery store?

A. Yeah, but she—I mean, she didn't take me anywhere. Well, she did. I forgot and she did.

Q. What grocery store did she take you?

A. The grocery store that—I don't remember what store she went to.

Q. When was that, when you were going to the school?

[5-134] A. Yeah.

Q. Was anyone else with you?

A. Um, no.

Q. Did she take you any other place?

A. No.

Q. Do you play make believe sometimes?

A. Sometimes.

Q. Okay, what do you make believe?

A. I pretend that—sometimes I pretend that I'm Rainbow Bright.

Q. Rainbow Bright, what's Rainbow Bright?

A. I have a doll of her but I lost her dress.

Q. You have a doll about Rainbow Bright?

A. Yeah.

Q. And what do you pretend that you are?

A. Sometimes I pretend I'm a little fairy.

Q. Okay and what do you do when you pretend you're a little fairy?

A. Well, I have this little magic wand and sometimes little fairy's [sic] have magic wands and I play with it to pretend that I have one.

Q. And what does that magic wand do?

A. Nothing. It doesn't do anything. I just pretend it does something.

Q. And what do you pretend to do with it?

[5-135] A. I pretend that it does magic.

Q. What can—what do you pretend that the magic wand does?

A. It makes everything disappear.

Q. That's a good trick, isn't it?

A. Um-hum.

Q. Do you do that often?

A. Yeah.

Q. What other games do you play that make believe?

A. Well, I play um, I don't really know anything I play. I don't remember anything else I play.

Q. Okay now, let's go back to where the lady with two thumbs put you in the ground. You were there for three whole hours huh?

A. Yes.

Q. Was it a long time or a short time?

A. I'm going to sit right here.

Q. Was it a long time or a short time?

A. Um, um, a real short time because a teacher helped me out.

Q. What did the teacher look like?

A. She was a good teacher, was one of the good teachers.

Q. Were the rocks on top of you or did you say they were next to you?

[5-136] A. Next to me.

Q. How many rocks were they?

A. There were four of them.

Q. Four rocks.

A. Um-hum.

Q. Okay and how big were they, small or big rocks?

A. Small rocks.

Q. Was the hole a big hole that you were placed in?

A. Yeah.

Q. Was there dirt around the hole?

A. Yeah.

Q. Who placed the dirt around the hole?

A. The lady with two thumbs.

Q. Did she have a shovel?

A. Yeah.

Q. Did you tell your daddy about the—being placed in the ground with the rocks and the dirt?

A. No.

Q. Did you tell your mommy?

A. No I forgot to tell them.

Q. When you went home that night, you forgot to tell them?

A. Yeah.

Q. It slipped your mind huh?

A. A. I forgot to tell them.

[5-137] Q. But the lady with the two thumbs did that, is that correct?

A. Yeah, yeah.

Q. Did anyone tell you to say that she did that?

A. No, because I—if my mom told me, or if my dad or mom told me to say that, I wouldn't. But they didn't so I wouldn't say it. So I didn't——

Q. You're saying it because it's true, is that right?

A. Yeah.

Q. Is that why you're saying it?

A. Yeah.

Q. And you're saying it's true that the lady with two thumbs dug this hole and put you in the hole for three hours——

A. Yeah.

Q. —with rocks, is that right?

A. Um-hum.

Q. And that's the truth, is that right?

A. Um-hum, yeah.

Q. And when you went home you forgot to tell your mommy and daddy about it?

A. Yeah.

Q. Now, is that the same truth like the lady touching you in your box? Is that the same kind of truth that you're telling?

[5-138] A. Yeah.

Q. And it's the same kind of truth that you're telling that the lady with the two thumbs touched you on your butt?

A. Yeah.

Q. And that's the same kind of truth you're telling me about the hole in the ground——

A. Yeah.

Q.—being buried, is that right?

A. Yeah.

Q. That really did happen——

A. Yeah.

Q. —the same way that you were touched in the front and back, is that right?

A. Yeah, yeah.

Q. No one told you to say any of those things?

A. No.

Q. But all of those things did happen?

A. Yeah.

Q. Just as you just said?

A. Um-hum.

Q. You're not making believe on any of these are you?

A. No. I'm not telling a lie.

Q. All of these things that you're telling me about the front and the back and the hole in the ground are all the [5-139] truth, is that right?

A. Yes.

Q. Did your clothes get dirty?

A. A little bit.

Q. Did your mommy ask you why your clothes were dirty?

A. No because the teacher washed them off.

Q. Does she take your clothes and wash them?

A. Yeah.

Q. Weren't you cold without your clothes?

A. No because she put me in a warm, snuggy blanket while she was washing them.

Q. Your teacher?

A. Um-hum.

Q. So the teacher took you from the hole in the ground and took your clothes off and washed the clothes, is that right?

A. Yeah.

Q. And she put a blanket around you?

A. Um-hum and then when she was done washing the clothes, she put them back on.

Q. Did they dry real fast?

A. Yeah.

Q. After she washed them, they dried real fast huh?

A. Yeah.

Q. Where were you staying—sitting when Frosty was [5-140] washing your clothes?

A. Um, on the ground.

Q. On the ground?

A. Yeah.

Q. Outside?

A. No.

Q. Where?

A. Inside.

Q. And who else was there?

A. Um, me, another bad person, because there is one more bad person.

Q. Did you get scratched from being next to the rocks or the rocks being on you?

A. Um. They were next to me, but I got a little bit scratched.

Q. Where did you get a little bit scratched?

A. Right here.

Q. What is that, your left leg?

A. I think.

Q. Near your ankle?

A. I think so.

Q. You think so, right about there?

A. Right there.

Q. You're indicating your left leg a little bit above your ankle. Did the scratch bleed?

[5-141] A. No.

Q. You just got scratched?

A. Yeah, but it's all gone now.

Q. It's all gone now?

A. Uh-huh.

Q. Did you show the scratch to your mommy?

A. Yes.

Q. Yes?

A. Yes.

Q. Did she put medicine on it?

A. Um, I don't remember. Am I all done now?

MR. KOLODNER: We're almost finished.

Q. Now you are telling us the truth about everything, aren't you?

A. Yeah, yes.

MR. KOLODNER: Okay, I have no further questions.

MS. O'DONNELL: I don't have any other questions. You're all done now Jessie Sue.

THE WITNESS: Okay.

(Video tape of Jessie Sue Smith ends)

(Counsel return to the courtroom)

THE COURT: We'll need the tape in evidence. Tell him to bring the tape in and put it in evidence. For the record, counsel are back in the courtroom. If you just wait a minute, counsel, we'll make the—we'll have the technician [5-142] give us the tape and receive it in evidence.

MS. O'DONNELL: Should we proceed Your Honor.

THE COURT: Well let's just wait one minute. The techni—they're winding up the tape. We'll receive it into evidence, then we'll proceed. Mr. Clerk, this is Court's four.

MS. O'DONNELL: The tape is completed Your Honor.

THE COURT: All right, I'll receive it into evidence as Court's exhibit number four. There's no objection I take it.

(Court's exhibit number four marked and entered into evidence)

MS. O'DONNELL: I would indicate that Lieutenant Pruit has indicated to Your Honor that the cap has been removed so the tape can't be changed.

THE COURT: Court's exhibit number four please.

* * *

[5-144] MS. O'DONNELL: The State would propose as the next witness Justin Peeples. He's a child and will testify through closed circuit television if he is deemed competent to do so.

THE COURT: How old is he, I'm sorry.

MS. O'DONNELL: He can testify——

THE COURT: No, how old is he. Just so I know. It's something to ask him.

MS. O'DONNELL: He is I think five years old. I'm pretty sure, yeah, I think he's five years old.

THE COURT: Is he on the premises now.

[5-145] MS. O'DONNELL: Yes, he's in my office or at least he was at lunchtime.

MR. KOLODNER: I would like to raise my same objections to this child as far as the closed circuit television and the for the use of the other crimes and for the same reasons that I recited in the other cases.

THE COURT: All right. I'll overrule your objection. Well let me send the jury back, talk to the child in chambers and go from there.

(Counsel and the defendant return to trial tables and the following ensued)

THE COURT: Ladies and gentlemen would you return back to the jury room for a brief period of time.

(Jury leaves courtroom)

THE COURT: All right counsel, I'll see you in chambers for a minute. Court will recess for a few mintues.

(Brief recess)

(Competency qualification of Justin Peeples by the Court in chambers via video tape)

COMPETENCY QUALIFICATION

BY THE COURT:

Q. I don't think we need that because you've got a good strong voice, don't you?

A. Yeah.

Q. All right, I'm here with Justin Peeples and with [5-146] counsel for the State and the defense and for the technician—and with the technician and Justin, I'm going to ask you just a few questions, okay?

A. Okay.

Q. And then when I finish these two people might want to ask you some questions, fair enough, okay?

A. Yeah.

Q. Now your name is Justin Peeples?

A. Yeah.

Q. Okay, how old are you Justin?

A. Oh about four years old.

Q. All right. Do you know your birthdate?

A. Yeah.

Q. When?

A. Well, it's a couple of weeks until Elliot's birthday starts.

Q. It's a couple of weeks until whose?

A. Elliot's birthday starts. You see we left him at Aunt Laura's house.

Q. Okay. So you're now four years old, right?

A. Yeah.

Q. Okay and who do you live with at home?

A. Well I live with mommy and also dad.

Q. Do you have any brothers and sisters?

A. No, I only have one brother.

[5-147] Q. And what is his name?

A. I already told you his name?

Q. Elliot?

A. Yeah.

Q. I wasn't sure, I'm sorry. I thought Elliot was your brother. How old's Elliot?

A. Oh, two and a half.

Q. So you're older than he is, right?

A. Yeah.

Q. Do you have any cats and dogs at home?

A. No.

Q. Okay. Now do you go to school Justin?

A. Yeah.

Q. Where do you go?

A. At Howard County Place—at Howard County Pre-School.

Q. At Howard County Pre-School, okay.

A. Yeah.

Q. Who's your teacher there?

A. I only have two teachers.

Q. Well, do you know their names?

A. Well, sometimes I can't remember their names, but sometimes in the evening I do.

Q. All right, is this one of those times when you might remember or do you think you can tell me their names now or?

[5-148] A. Well, no.

Q. Okay. Do other boys and girls go to Howard County Pre-School with you?

A. Sure.

Q. What do you do there?

A. Oh, well, I play and also I eat snacks.

Q. Do you learn a little bit too?

A. Yeah and also I play. They have lots of playing rooms.

Q. Good, good. What are some of the things you play there?

A. Well, well there's toys and on the other side there's a roast up games.

Q. A roast up game?

A. Yeah.

Q. Okay. Do you have any books? Does a teacher read you any stories or anything like that?

A. No. We read the stories by ourselves.

Q. Okay. Can you read by yourself?

A. Yeah.

Q. Okay. I didn't know that. Do you know some of your letters and your numbers and colors?

A. I know all of my letters and numbers and colors.

Q. All of them?

A. Yeah.

[5-149] Q. Tell me—count for me. Can you count for me? Can you tell me some numbers?

A. Sure.

Q. Tell me some. One——

A. One, two, three.

Q. Very good. Do you know any numbers after three?

A. Four, five, six.

Q. I'm afraid to ask you. Do you know any numbers after six?

A. Seven, eight, nine.

Q. How about your letters. Do you know your A.B.C.'s?

A. Yeah.

Q. Tell me your A.B.C.'s.

A. Well, it goes like this a,b,c,d,e,f,g,h,i,j,k,l,m,n,o, p,q,r,s,t,u,v,w,x,y,z.

Q. Very good, very good.

A. See someone—you see someone makes mistakes, you see like a to y and a to x.

Q. They leave out the z or something like that?

A. Yeah and leave out the y or something like that.

Q. I guess that could be a problem.

A. Yeah. There are some people that do.

Q. Okay. How about colors. You know colors of course?

A. Yeah.

Q. What color is this robe that I've got on here over [5-150] my shirt?

A. Black.

Q. Right. And how about this tie that I'm wearing, what color is that?

A. Red.

Q. Very good and this pad of paper here is—what color would you say that is?

A. Well, it's yellow and red and black.

Q. Very good, it has red and black lines, right?

A. Yeah.

Q. You go to Howard County Pre-School. Did you go to school before you went there?

A. No.

Q. You didn't?

A. No.

Q. Did you go to day care before you went to Howard County Pre-School?

A. No, but you see we're trying to find Elliot's birthday present.

Q. You lost Elliot's birthday present?

A. What?

Q. Did you lose it?

A. Yeah. But you see we're trying to find the vacation stuff for his birthday present.

Q. Where do you think it is, do you know?

[5-151] A. Yeah. It's at the front row at Caldor's.

Q. Do you know what it means to tell the truth and to tell a lie Justin?

A. Yeah.

Q. Is it bad to tell a lie?

A. Yeah.

Q. If I told you that I was a lady, would I be telling the truth?

A. No.

Q. Why?

A. Because you're—you would be lying.

Q. Right, because I'm not a lady, right?

A. No.

Q. If you told me you were a school teacher, would you be telling me the truth?

A. No.

Q. Why?

A. Because I'd be lying, if that is what I was doing.

Q. Okay, have you ever told a lie before?

A. No.

Q. Is it bad to tell a lie?

A. Yes.

Q. Do you know that we're going to ask you some questions here today?

A. Sure.

[5-152] Q. And you're going to tell me the truth?

A. Sure.

Q. Will you promise to tell me the truth?

A. Sure.

Q. Okay and you know that if you didn't tell me the truth it would be wrong, right?

A. Right.

Q. Okay. Who did you come here today with? Did somebody bring you today to this building?

A. Yeah.

Q. Who was it?

A. Well, mommy did. Oh, and Kate did. She's right back there.

Q. All right. She came over to this building with you?

A. Yeah.

Q. How did you come from your house, in a car?

A. Yeah.

Q. Who was in the car?

A. Oh, mommy was and I was and Elliot was, but we went to drop Elliot off to Aunt Laura's house, remember?

Q. Okay. Did your mommy tell you what to tell me?

A. Yeah.

Q. What did she tell you to tell me?

A. Well, I can't remember, because see sometimes [5-153] I remember and sometimes I don't.

Q. When I ask you certain questions are you going to tell me what you remember?

A. Yeah.

Q. You won't—will you tell me what people told you to tell me or what you remember?

A. Yeah.

Q. All right. Did anybody tell you to tell me something that wasn't true, that was a lie?

A. No.

Q. Do you remember going to the Craig's School, Craig's Country School?

A. Yeah.

Q. All right.

A. It was in my dream.

Q. It was in your dream?

A. Yeah.

Q. If I ask you some questions about the Craig's School or if these people ask you some questions about the Craig's School, would you tell us the truth?

A. Sure.

Q. Do you remember going to the Craig's School?

A. Sure.

Q. Did anybody tell you to tell us a lie about the Craig's School?

[5-154] A. No.

Q. So that if we ask you questions about the Craig's School, you're going to tell us the truth and not what somebody else told you?

A. Oh, sure.

Q. And do you know that it would be wrong to tell us a lie?

A. Yeah.

Q. Do you know where you are today?

A. No, where?

Q. Do you have any idea where you are?

A. Yeah.

Q. Where?

A. At Howard County Pre-School.

Q. Do you think that this is your school?

A. No.

Q. Do you know what building you're in today?

A. What?

Q. No, I'm asking. Do you know why I'm wearing this funny thing here?

A. No, why?

Q. Well, it's a long story. I'm not sure I know the answer Justin. Do you know you're in court today?

A. Yeah.

Q. All right and do you know when I—do you know [5-155] that I'm a Judge?

A. Yeah.

Q. Oaky [sic] and you know that I ask you questions or these two people behind you ask you questions, you must tell them the truth?

A. Yeah.

Q. Will you tell them the truth?

A. Sure.

THE COURT: Okay. Justin, I'm going to have to go outside for a few minutes.

A. Why?

Q. Why? I have to talk to them outside for a few minutes, is that okay?

A. Sure.

Q. Will you just sit here for a few minutes and Miss Kate will be back with Mr. Kolodner, that's this gentleman——

A. Okay.

Q.—and they're going to ask you a few questions, okay?

A. Okay.

Q. Okay, I'll be back in a few minutes, all right. You just get comfortable.

A. Okay.

(Court and counsel leave chambers and enter the courtroom and counsel and the defendant approach the bench [5-156] and the following ensued)

THE CLERK: Stand please.

THE COURT: Be seated please. Would counsel like to be heard as to whether it's appropriate for me to hear from this child as a witness.

MS. O'DONNELL: The State believes the preliminary questions of Justin deem him competent to testify.

THE COURT: Would you care to comment Mr. Kolodner.

MR. KOLODNER: I would object and would state for the record that I didn't think that he answered questions to make him qualify.

THE COURT: He certainly asked me tougher questions than you. I don't make light of Mr. Kolodner's concern. Obviously he has a right to believe that the witness is not competent. I'm satisfied that the witness is competent. I'm satisfied that based upon my questioning of

him he has the ability to communicate intelligently with us, to understand the questions that are asked of him and to frame responses and intelligent answers. I'm satisfied that he remembers being at Craig's Pre-School, that he has the capacity to observe and remember the matters about which he's being called to testify and I'm satisfied that he understands his obligation to speak the truth and to testify truthfully. So I will permit him to testify as a witness, since I find him to be a competent witness.

[5-157] Counsel, why don't you return to my chambers and I'll have the Clerk bring the jury out, all right.

(Counsel return to trial tables and the following ensued)

(Ms. O'Donnell and Mr. Kolodner return to chambers to examine Justin Peeples)

(Jury enters courtroom)

THE COURT: We're ready anytime you are. I don't think they heard me.

MS. O'DONNELL: Justin, I want you to sit there and listen very carefully and I'm going to ask you some questions.

THE WITNESS: Okay.

MS. O'DONNELL: And then Mr. Kolodner's going to ask you some questions.

THE WITNESS: Okay.

MS. O'DONNELL: First this man wants to tell you to promise to tell the truth.

THE WITNESS: Sure.

(Witness Sworn)

(Video tape examination of Justin Peeples)

DIRECT EXAMINATION

BY MS. O'DONNELL:

Q. Justin, what is your whole name?

A. Well, Justin Grant Peeples, of course.

[5-158] Q. And where do you live?

A. Well at 9172 Wind Flower Drive, Ellicott City, Maryland, 21043.

Q. And who do you live there with?

A. Elliot and mommy and dad.

Q. And who is Elliot? Tell us who Elliot is?

A. Oh, Elliot's my brother.

Q. Is he your little brother or your big brother?

A. Well, he's kind of big, but only just this old.

Q. Is he older than you or younger than you?

A. He's older.

Q. He's older than you are?

A. Yes, yes, he is.

Q. What's your dad's name?

A. Ron.

Q. And what's your mom's name?

A. Pat.

Q. And how old are you?

A. Four years old.

Q. I want you to sit up and I'm going to ask you some questions and I want you to tell the truth, the whole truth and nothing but the truth, okay?

A. Okay.

Q. Do you know what it means to tell the truth?

A. Yes.

[5-159] Q. Is it important to tell the truth?

A. Yes.

Q. Do you know what it means to tell a lie?

A. No.

Q. If I said that you had on a dress, would that be the truth or would that be a lie?

A. That would be the truth.

Q. That you have on a dress?

A. Yes.

Q. What do you have on?

A. Some shirts and pants. What else would I be wearing?

Q. Well, you just said you had on a dress. What am I wearing?

A. A dress too.

Q. If I said that you were old enough to drive a car, would that be the truth or would that be a lie?

A. I don't know how to drive a car. You always made mistakes when that's a lie.

Q. If I said you have on blue shoes, would that be the truth or would that be a lie?

A. That would be a lie.

Q. What color are your shoes?

A. Black.

Q. If I said you had on blue pants, would that be the [5-160] truth or would that be a lie?

A. That would be the truth.

Q. If I said you had on a pink shirt, would that be the truth or would that be a lie?

A. The lie.

Q. Where do you go to school?

A. At Howard County Pre-School.

Q. And what grade are you in, what is the name of your class?

A. The first grade.

Q. Where did you go to school before you went to Howard County Pre-School?

A. Do you know Elliot's birthday starts on Monday and I only—he goes to school on Monday, Wednesday and Friday and today's——

Q. Justin, I'm going to ask you some questions. I want you to answer my questions, okay?

A. Okay.

Q. Where did you go to school before you went to Howard County Pre-School?

A. Mrs. Craig's School in my dream.

Q. Was Mrs. Craig's School a nice school or a bad school?

A. A bad school.

Q. Do you remember Mrs. Craig?

[5-161] A. Yes.

Q. Was she a nice lady or was she a bad lady?

A. A bad lady.

Q. Did Mrs. Craig ever do anything bad to you?

A. Yeah.

Q. What did she do?

A. She poked me with a screwdriver in my dream. What else would she be doing.

Q. What did she poke you with—where did she poke with the screwdriver?

A. Well sometimes she poked me on my foot.

Q. Where else did she poke you, only the truth?

A. Well and sometimes she poked it on my leg.

Q. And where else did she poke it?

A. Uh, a place on my knee I hope.

Q. Mrs. Craig really did poke you someplace else, didn't she Justin?

MR. KOLODNER: Objection.

A. Yes.

(Sound pulled on video)

THE COURT: I'm going to overrule the objection and permit you to lead the witness. You may continue.

THE WITNESS: Was that my dad?

MS. O'DONNELL: No that was the Judge.

THE WITNESS: Oh.

[5-162] Q. Justin, did—where did Mrs. Craig really poke you?

A. Well, well, well, I told you about the foot and the leg and the knee.

Q. Where else did she really poke you?

A. Well, that's all the places that she poked me.

Q. Remember you promised to tell the truth?

A. Yes.

Q. Where else did she poke you? Is it true that she poked you someplace else?

A. No.

Q. Is it true she poked you in the hiney?

MR. KOLODNER: Objection.

A. No.

(Sound pulled on video)

THE COURT: I'll overrule the objection. You can lead the witness, go ahead.

Q. Tell the truth—tell the truth, Justin, okay. Promise to tell the Judge the truth.

A. Okay.

Q. Where else did you get poked?

A. In my hiney, of course.

Q. And what did you get poked on your hiney with?

A. A screwdriver. What else would she poke me with.

Q. And who poked you there?

[5-163] A. Mrs. Craig did. Who else will.

Q. And is that the truth, the whole truth?

A. Yeah.

Q. That's not an easy thing to talk about is it?

A. No, but sometimes I don't remember these things that I am supposed to say.

MS. O'DONNELL: Mr. Kolodner, witness with you.

THE WITNESS: What?

MS. O'DONNELL: Mr. Kolodner's going to ask you some questions okay?

THE WITNESS: Okay.

CROSS-EXAMINATION

BY MR. KOLODNER:

Q. Do you play ball in school?

A. Yeah.

Q. I bet you're a good ball player, aren't you?

A. Yeah.

Q. What's your best sport?

A. Well, basketball and football, and I can't forget soccer.

Q. Are you good at soccer?

A. Yeah.

Q. Real good, huh?

A. Yeah.

Q. You score a lot of goals?

[5-164] A. Yes.

Q. You beat the goalie, huh?

A. Yeah. Oh and also we have a bowling toy set.

Q. You know how to bowl?

A. Yeah if it's a bowling toy.

Q. You like toys?

A. Yeah.

Q. Well, you're such a good boy I have a toy for you. Would you like this toy?

A. Oh sure.

Q. How do you like that?

A. Well.

Q. Does that make us friends?

A. Sure.

Q. Okay.

A. What does this bear do?

Q. I don't know. It's called a "take-out" toy.

A. "Take-out" toy?

Q. Um-hum. I guess you'll learn how to do it, but let me put it down for awhile, then when you leave, you'll take with you, okay?

A. Okay.

Q. Just put it next to you. That's fine. Then you can take it with you when you leave, okay, and you'll figure it out.

[5-165] A. Yeah. I bet it will be a surprise for mommy.

Q. Yeah, she'll be surprised.

A. She'll be surprised.

Q. And now that we're friends, you're going to tell me the truth about everything, right?

A. Except I don't know the words.

Q. You mean you don't know exactly what you're supposed to be saying, is that what you mean?

A. Yeah.

Q. When you started to answer the questions you said, I don't always remember the words to the questions, is that what you mean?

A. Yeah, of course.

Q. Someone has told you the question, right?

A. Right.

Q. And then you just don't remember all the time what words you're supposed to say, isn't that right?

A. Right.

Q. Now, the last thing you said when you were being asked questions, you just don't remember the things I'm supposed to say, is that right?

A. Yeah.

Q. Is that what you said?

A. Yeah.

[5-166] Q. Okay. Now first of all, have you ever been in this room before?

A. No.

Q. You've never been here?

A. No.

Q. Okay now, who told you what things you were supposed to say?

A. Well, I can't remember what the people say that I have to say.

Q. Okay. Well was it your mommy who told you what to say?

A. No.

Q. Well who are the people who told you what to say?

A. I don't know.

Q. But was there some people who told you what to say?

A. Yes.

Q. Well when was that?

A. About Thursday in a week.

Q. Last week sometime?

A. Yeah.

Q. And you sort of forgot the questions and you forgot the answers, is that right?

A. Right.

Q. How many times did they tell you what to say?

A. One time.

[5-167] Q. Did they tell you this morning when you were coming here that you were going to be asked the same questions?

A. No. About in when Thursday week.

Q. It was on a Thursday?

A. Yeah.

Q. And try to remember real hard who told you the questions? Who was it?

A. Mrs. Craig.

Q. Mrs. Craig told you what questions?

A. No.

Q. You mean they told you the questions about Mrs. Craig, is that what you mean?

A. Yes.

Q. And they told you you were going to be asked about Mrs Craig, is that right?

A. Yeah.

Q. And they told you Mrs. Craig was bad, is that right?

A. Yeah.

Q. And they told you Craig's School was bad?

A. Yeah.

Q. And you sort of forgot the questions and what you were supposed to answer, is that right?

A. Right.

Q. Now they talked all about Mrs Craig?

A. Yeah.

[5-168] Q. Did they talk about anyone else?

A. Yeah.

Q. Who?

A. Well I can't remember the other teacher's name. The only teacher I know is Mrs. Craig.

Q. Okay, and that's who they were talking about, is that right?

A. Yes.

Q. Your mommy doesn't like Mrs. Craig, does she?

A. No.

Q. Why do you say that?

A. I don't know.

Q. Did she tell you?

A. No.

Q. Your mommy doesn't like the Craig School, does she?

A. No, uh-uh.

Q. Uh-uh, you say that real strong, huh?

A. Yes.

Q. Why, did she tell you?

A. Yeah.

Q. Did she tell you a lot of times?

A. Sure

Q. Did she tell you a lot of times she doesn't like Mrs. Craig too, right?

[5-169] A. Oh, yeah, sure, can't forget that.

Q. Can't forget that. Is that what they told you, not to forget that, huh?

A. Yeah. Why are those golden bracelets around your arm?

Q. Well I guess someone told me to wear them. Did—your mommy gets happy when you say bad things about Mrs. Craig, doesn't she?

A. No, yes. No, no she doesn't.

Q. Now do you play games, make believe games?

A. Yeah, yeah.

Q. What do you make believe that you are?

A. (Inaudible) I make believe I'm a bear.

Q. A bear?

A. Yeah.

Q. And what does a bear do?

A. Well, he roars, he roars, he roars loud like a lion.

Q. Do you sometimes believe you're a lion?

A. No.

Q. Just a bear?

A. Sure.

Q. And what else do you make believe that you are?

A. I don't know.

Q. Do you play make believe with your friends?

[5-170] A. Yeah.

Q. And what else do the rest of your friends make believe?

A. Well, I don't know. Did you know I have four more friends?

Q. I bet you have a lot of friends because you're a very nice young man.

A. Well they live in another house next door to Aunt Laura's house.

Q. You know sometimes you don't tell the truth though, do you?

A. Yeah.

Q. Okay. What—do you get punished when you don't tell the truth?

A. Yes.

Q. And how do you get punished? Do you have to stay in your room or do you have to sit in a chair?

A. I have to sit in the chair.

Q. What do you tell things—what—what things do you talk about that aren't the truth?

A. I don't know.

Q. But sometimes you do, you tell things that aren't the truth, right?

A. Yeah.

Q. When was the last time you got punished for not [5-171] telling the truth?

A. How about sixty weeks ago.

Q. Well that's a long time ago?

A. Yeah.

Q. Will your mommy get mad if you don't remember all the questions?

A. Sure.

Q. When Mrs. Craig touched you with the screwdriver—

—

A. No, poked me.

Q. —poked you with a screwdriver——

A. It was not touching, it's poke.

Q. —poked, is that what they told you to say?

A. Sure.

Q. Do you remember who told you to say that?

A. No.

Q. But someone did tell you, is that right?

A. Right.

Q. Well when Mrs. Craig poked you with the screwdriver did you tell your mommy about it?

A. No.

Q. Why?

A. Well—well, sometimes she comes to my house. But when she comes to my house I bounce away.

Q. Who is that Mrs. Craig?

A. Yeah.

[5-172] Q. Mrs. Craig came to your house?

A. Yeah.

Q. How many times did she come to your house?

A. Well about three weeks.

Q. Three weeks ago?

A. Yeah.

Q. And what does she do at your house?

A. Well—well sometimes she steals my games, but she doesn't know that they're mine.

Q. Did she steal your games three weeks ago?

A. No, four weeks.

Q. Four weeks ago?

A. Yeah, she slept real fast this morning.

Q. What did she do this morning?

A. She slept real fast at night.

Q. I see.

A. When I was a little baby.

Q. Four weeks ago she stole your toys, is that—your games?

A. Yeah. Oh you know what this is?

Q. What is that?

A. (inaudible) That's the thing—that's the (inaudible) that you (coughing) that tells you what number your pants are.

Q. Oh I see. Now when did Mrs. Craig come to your house, about three weeks ago?

[5-173] A. Yeah.

Q. Okay and she stole your—did she try to steal your games?

A. Yeah.

Q. Was she able to?

A. No.

Q. Who stopped her?

A. Mommy did.

Q. What did she tell her?

A. What?

Q. What did she tell her? Did she tell her to stop stealing your toys?

A. Yeah and she told her don't take anything unless someone else tells you they're—it's okay. Why is that phone cord tape there?

Q. Okay. Now did that really happen or are you making that up? Is that the truth?

A. Yeah. That happened in my dream.

Q. It happened in your dreams?

A. Yeah.

Q. Now you said that Mrs. Craig slept with you at your house. Is that—when did that happen?

A. About fifteen weeks.

Q. You mean a long time ago?

A. Yeah.

[5-174] Q. Now did that really happen or is that what you believe happened?

A. That's what I believe happened.

Q. Did Mrs. Craig poking you in your hiney really happen or is that something you believe happened?

A. That's something I believe happened.

Q. And is it—Mrs. Craig poking you in your hiney, is that what someone told you to say, or did it happen?

A. It happened in my dream.

Q. Are the questions that I'm asking you some of the questions someone told you——

A. Yeah.

THE COURT: Would counsel please pick up the phone.

THE WITNESS: Why did the Judge say——

(Sound pulled on video)

MR. KOLODNER: Okay Justin, I don't have any other questions.

THE WITNESS: Okay.

MS. O'DONNELL: I don't have any questions.

THE WITNESS: Is it okay for me to go now.

(End of video tape of Justin Peeples)

THE COURT: Sheriff, would you tell the Lieutenant to bring the tape in with him so we can file it as an exhibit.

(Counsel return to the courtroom and the following ensued)

[5-175] MS. O'DONNELL: Excuse me minute, Your Honor, somebody has to escort the child out of the courthouse.

THE COURT: Counsel, I'm going to receive as the next Court's exhibit the tape of the testimony of the young man who just testified, Justin Peeples, and I would be of

a mind to mark it as Court's exhibit number five, Mr. Clerk.

THE CLERK: Number six, excuse me, five Your Honor.

THE COURT: Number five. I assume there's no objection. It's received in evidence.

MR. KOLODNER: No objection.

THE COURT: Thank you.

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[Court Reporter's Certificate omitted in printing]

IN THE CIRCUIT COURT
FOR HOWARD COUNTY

Case No. 15625

STATE OF MARYLAND

v.

SANDRA CRAIG

Filed
9-21-87
10:00 am

SECOND AMENDED MOTION FOR NEW TRIAL

Defendant Sandra Craig, by her attorneys William H. Murphy, Jr., M. Cristina Gutierrez, and Nelson R. Stewart, pursuant to Rules 4-331(a) and (c), hereby again amends the motion for new trial previously filed in this case for the reasons stated in *State v. Richard Bryan Wildermuth*, ___ Md. ___ (No. 2, September Term, filed September 10, 1987).

/s/ William H. Murphy, Jr.
William H. Murphy, Jr., Esq.
1007 North Calvert Street
Baltimore, Maryland 21202
(301) 539-6500

/s/ M. Cristina Gutierrez
M. Cristina Gutierrez, Esq.
1007 North Calvert Street
Baltimore, Maryland 21202
(301) 539-6500

/s/ Nelson R. Stewart
Nelson R. Stewart
1007 North Calvert Street
Baltimore, Maryland 21202
(301) 539-6500

[Certificate of Service omitted in printing]

[S1-1]

IN THE CIRCUIT COURT
FOR HOWARD COUNTY, MARYLAND

CASE NO. 15625

STATE OF MARYLAND

versus

SANDRA A. CRAIG,

Defendant.

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS
(Sentencing)

Ellicott City, Maryland

Monday, September 21, 1987

BEFORE:

HONORABLE RAYMOND J. KANE, JR., Judge

APPEARANCES:

For the State:

A. GALLATIN WARFIELD, III, ESQ.,
MARY CATHERINE O'DONNELL, ESQ.,

For the defendant:

WILLIAM H. MURPHY, ESQ.,
CHRISTINA M. GUTIERREZ, ESQ.
NELSON R. STEWART, ESQ.

JANICE M. MERKLE
Official Court Reporter
Circuit Court Courthouse
Ellicott City, Maryland 21043

[S1-2] **PROCEEDINGS**

THE CLERK: Your Honor, calling Criminal Case Number 15625, State of Maryland versus Sandra A. Craig.

MR. WARFIELD: Good morning, Your Honor, for the record, A. Gallatin Warfield the third, and Kate O'Donnell, on behalf of the State.

MR. MURPHY: William H. Murphy, Jr., Your Honor, on behalf of Sandra Craig, along with M. Christina Gutierrez.

THE COURT: Counsel, there's some preliminary motions or matters you wish me to consider.

MR. MURPHY: Yes, Judge. As we indicated in Court, we wish to amend our Motion for New Trial in this case to reflect the issues decided in the case of State of Maryland versus, or rather, Richard Brian Wildermuth, W-I-L-D-E-R-M-U-T-H versus the State of Maryland, September term number two, filed on September tenth, 1987. An Opinion written by Judge Atkins. We feel that this case is almost identical to the one you've decided. To the extent that all that would really be necessary to make it identical, would be to change it to State versus Wildermuth to State versus Sandra Craig. The Court couldn't have been any clearer about what happened. What the Court said, very simply, was, that what Judge Williams did was deficient in two ways. Judge Williams, first of all, [S1-3] did not seek enough testimony from the experts in this case, and lo and behold, that happened here. And then, the Court said, more fundamentally, that Judge Williams did not personally question the child, as Judge Heller had done in the companion case, which they affirmed. And, lo and behold, we look at the record, the Court didn't question the child or any of the other children in this case. And bear in mind, Judge, each one of these four children's testimony is important. The State felt it was important. The State

put on all four because it felt that this kind of evidence would strengthen its case. And in this case, the Court did not question any of these children, and it was until the trial that there was any question by this Court. And it wasn't on the issues raised in this case. And so there's nothing in the record as there was in the companion case here of James Sylvester McKoy versus State, and that's M-C-K-O-Y, which would lead to the Court of Appeals sustaining or affirming what the Court did here. And so, because this case literally fits the Sandra Craig case like a glove, because the issues are identical, and because the findings in this Court do not exist. And because there is no way that the Court could, in a post-trial sense, make the findings because there was nothing asked by the Court of the children relevant to the issues involved, I believe that [S1-4] it is clear that this Court must grant Ms. Sandra Craig a new trial. One final thing, this case, the Wildermuth case and the McKoy case, were pending, in the Court of Appeals, the briefs had been filed, at the time that this matter was argued before this Court, and so, it was public knowledge that there were two things happening on these issues. Number one, that there was a challenge to the statute permitting video testimony in lieu of incourt testimony, and number two, the nature of those challenges, that is, the list of issues, which were used by other lawyers, to attack the procedure. All of these issues existed at the time of this case and were public. And so, certain duties flowed from the public nature of this. We understood what those duties were. We raised those issues as I'm sure the State will concede in its argument as a part of our amended Motion for New Trial in this case, and we tried to get the Court to do these things in the Jamal Craig case. And so, for those reasons, Judge, we believe that the Court ought to grant a new trial. There is no harmless error here. There is no escape from the clear requirement that the Court laid out as follows: "Moreover, Judge Williams never questioned or even ob-

served the child witness before he made his ruling. While personal observation by the Judge may not be the sine qua non," and I checked with Mr. Warfield before pronouncing that [S1-5] word, Judge, under Section nine dash one oh two, "it should be the rule rather than the exception". And so, the Court lays out that the rule is, that this Court must question the child. And then it goes further, it saids, "On the one hand, a Judge's subjective and self-justifying recollections of the child's demeanor, absent support in the record, will not be enough to justify finding, justify a finding that limits the right of confrontation." Now, that suggests real strongly, that any post-trial finding by this Court would be looked at with a great deal of skepticism as not being something they want this Court to do. On the other hand, as the Court saids, "Expert testimony may not be essential to establish the necessary predicate. For example, the testimony would apparently be sufficient when combined with the child's own testimony, and judicial observation of the child. We shall not attempt to list all the possible ways in which evidence may meet the standard, or all the ways in which it may fall short. We repeat, however,—They repeat, Judge, very rarely in these Opinions, and when they repeat, they mean it for emphasis, they say, "We repeat, however, that ordinarily the Judge should observe and question the child." And the State will say that you observed and questioned the child, but I think what they really mean is on the issues concerning video testimony. And the record is clear that [S1-6] the Court did not question the child on those issues. Now, finally it saids, "Testimony about the likely impact on the child testifying must be definite and related to the statutory standard and specific to the potential child witness, him or herself. There must be a particularized examination of all the circumstances concerning the impact of public testimony in the presence of the defendant, upon the emotional health of the child." And so, they grant Mr. Wildermuth a new trial. We believe, for the same reasons,

Sandra Craig is entitled to a new trial. I've been brief on my argument on this issue, because I'm anxious to hear how creative the State will be in attempting to have this Court not follow the rule. And, as enunciated by Wildermuth, and I'll have a brief rebuttal, if the Court will permit it.

MR. WARFIELD: Thank you, Your Honor. May it please the Court. It's easy to be creative with this because, although counsel cites the Wildermuth case, he does not cite the McKoy case, which is the companion case, which came down at the same time that the Wildermuth case was handed down. And the McKoy case was affirmed, and the reason that the McKoy case was affirmed was that, during trial, the only issue that was raised was the constitutionality of the statute. The evidentiary basis was not raised as an objection, nor was it in the Sandra Craig [S1-7] case. And I have provided counsel with a transcript of the arguments that were put before the Court, and very, very clearly, there was no argument to the Court on any other basis, other than the constitutionality of the statute. And that having not been raised at that time is very clearly waived. The rationale behind making objections, the rationale informing the Court when counsel is not satisfied with something that is going on, and wanting the Court to take some action, is set forth in Maryland Rule four three twenty-two. And the rationale being, that if you got a problem, bring it to the Court's attention and let the Court correct it. Well the problem that was presented to the Court was a constitutional problem. And the Court was asked to rule on the constitutionality, and the Court ruled on the constitutionality. There is a case called Smith versus State, sixty-four Maryland Appellate Report six twenty-five, which essentially states that if an objection is not made, and pursuant to Rule four three twenty-two, unless there are extraordinary circumstances, and in that case, the Judge's law clerk actually went out and did some research, and presented some information to the Judge,

and they ruled that that was extraordinary. But unless there are extraordinary circumstances, that it would not be reviewed. On appeal. So, the issue, quite frankly, and I will present some [S1-8] argument to the Court on the merits, but it's a procedural situation that we find ourselves in, and it was not raised by counsel at trial. And under the McKoy case, and obviously under the McKoy, and in light of the Smith case, which I just cited, the Court did not consider that the failure of the Judge in that case to actually talk to the children was of such extraordinary circumstances as to render that a reviewable decision, and therefore, that case was upheld. So, very, very clearly there's a waiver here, and it's not before the Court. But let's assume for the sake of argument, that it is before the Court. I would cite the Christian case to Your Honor, and it's three oh nine Maryland one fourteen. And the Christian case is one that I, it precedes the Martinez case in the Appellate Reports, so I'm sure that Mr. Murphy is familiar with it. It's in the Maryland Reports, that is. And Mr. Murphy cites the Martinez case for every conceivable proposition, but it's the case that is right before it. So I'm sure that he is aware of it. And essentially the Christian case saids, that the Rulings of the Court of an interlocutory nature, which would be any Ruling preceding sentencing, is still subject to the revisory power of the Court. So I think the Court has the opportunity, under the Christian case, to take a look at what the Court has already done. In other words, to look back in the [S1-9] Christian case, in fact the Court had granted a new trial. And then there was a case subsequent to that in which the Court of Appeals issued a Ruling that had some effect on that, and then the Court turned around and withdrew the new trial, in other words, overruled the New Trial Motion after it had already granted it, and then sentenced the defendant. So, I would submit, Your Honor, that the Court has the ability and the power, up til sentencing, to take a look at all interlocutory orders, and consider that,

in light of any subsequent information, as was done in the Christian case. And to evaluate and supplement, or to affirm, or to take whatever action that the Court feels and deems appropriate with respect to that particular order. And I would submit, Your Honor, that even assuming on the merits, and we're not, and our position, very clearly, is that this issue was waived, and that it is affirmable under the McKoy standard. But let's assume, and take a look at the Wildermuth standard, that the issue would be appropriate for determination. And I submit that the Court can examine the record and find many, many substantial factual differences which would support the underlying Ruling that the Court has already handed down. Without the testimony of the therapist, and I might point out that in the Wildermuth case, the child was nine years old. The age of the children in this case ranged from [S1-10] four to six years. There was testimony concerning physical manifestations of the children in terms of their ability to communicate. Rolling up into a ball. Hiding, in one particular case. Having breathing disorders, in the case of Brooke Etze. And there was an additional fact. These, incidentally, are facts, which did not exist in the Wildermuth case. There was specific testimony concerning threats and fear of the defendant. In other words, the fact that the child, the children, Brooke Etze in particular, and the other children who testified, and this is testimony in the hearing on the video, feared for their lives, and feared that Mrs. Craig would do something to them. And specifically, that point is addressed in the Wildermuth case, in footnote ten, in which it points out the fact that a witness has been threatened is a very significant factor in depriving the defendant of a face-to-face confrontation. So that is a specific point that was before the Court at that time, and which is, was addressed in Wildermuth, and was addressed to the extent that that is a significant factor. I think the court had an opportunity, and has had an opportunity, post the hearing, to observe the children. And

I think the Court can take that into consideration in, at this particular point, looking back, and determining if the original Ruling was, in fact, correct. Because now the Court has had the opportunity to observe [S1-11] the children, to observe their demeanor, to talk to them, in the context of the competency hearing. There is additional information, which has come to the Court's attention. The entire files of the therapist was put into the record in the New Trial Motion. Mr. Murphy raised the issue, raised the question concerning all the contacts of the child. During the course of that, there was information put before the Court as to a confrontation, post-trial, that Brooke Etze had with the Craig family, and how she doubled up, and had great difficulty at that particular time. And her father had to take her out. She physically, had a physical manifestation. That's before the Court. That's an example of an occurrance [sic] that would have, at least in hindsight, supported the fact that Brooke Etze would not be able to come in and face the individual who is alleged to have abused her. You had, I think, before the Court, a very, very, and the Court had the ability to see the demeanor of Mrs. Craig during the course of the testimony of various witnesses, and to see the fact that Mrs. Craig, in fact, with respect to a witness, Dilia Zeledon, Mrs. Craig was staring at her, very intensely, and it, and this was an adult witness, a former teacher at the school, and I had to instruct the witness not to look at Mrs. Craig because the witness was falling apart on the stand, by virtue of the very con- [S1-12] frontation here in Court. And I would submit that the Court had an opportunity to observe and to see the demeanor of the defendant, vis-a-vis the witnesses in the case, and to understand the ability of that particular type of conduct, and the effect that that would have on a witness. And that's an additional factor, I think, that the Court could take into consideration. Furthermore, the Court had the testimony of the parents concerning the demeanor of the children. Your Honor, I looked up sine

qua non because, although trying to school Mr. Murphy in its proper pronunciation, which I probably didn't even do myself. Sine qua non is Latin for without which not. That without which the thing cannot be. And this is from *Black's Law Dictionary*. An indispensible requisite or condition. And counsel himself in citing the Wildermuth case, has quoted the fact, and the Court has indicated and stated quite clearly, that it is not a sine qua non that the Judge interview the child before the Ruling. And I mean, counsel is saying that it is, and the Court is saying it is not. It is something that could have been done in that particular case. It's something which would have perhaps permitted, under the facts that were presented there, the Court to make the ultimate Ruling. But it is not an absolute, an indispensible requisite or condition. And very clearly, the Court said that. The facts and [S1-13] circumstances of each case have to dictate the ultimate propriety of the Court's Ruling. The underlying rationale of my interpretation of the Ruling, is that the information before the Court has to establish, essentially, that there's a de facto unavailability of the witness by virtue of the witness's distress, being in the courtroom setting, being faced with the defendant, and not being able to communicate. On the basis of all of the information that was before the Court, prior to the Ruling and subsequent to the Ruling, and on the basis of the facts that were established that are substantially different from the facts in the Wildermuth case. The age of the children. The fact of threats. The physical manifestations of problems that the children have had, and continue to have with respect to even discussing the incidents involved. When you put it all together, even under the Wildermuth test, which is not even applicable in this case because it was waived. But even under Wildermuth, there was enough evidence to support the Court's Rule. I would submit that the Christian case would enable the Court to take that into consideration, and say, I'm familiar with the case, I've read the case, and that there is nothing

in the record that would cause me to change my ultimate decision. And I think it's proper, and I think the Court has the ability to do that. I would submit on both cases. On [S1-14] both cases. That the Court's Ruling was proper. And I would ask the Court to uphold the Ruling, and to deny the Motion for New Trial. Thank you, Your Honor.

THE COURT: Mr. Murphy?

MR. MURPHY: Thank you, Your Honor. Well, once again I think the State finds itself asking this Court to make an exception to, what is now the established law of Maryland. The Court felt that it was the rule that the Court ought to question the child. And unlike that the (sic) State said in the McKoy case, Judge Robert Heller there, did question the child. If you look at page four of the Opinion, it saids, "During the course of", first of all, page three, it starts at the bottom. "Somewhat different circumstances preceded the use of nine dash one oh two in McKoy's case. His nine year old daughter, the alleged victim, was called to testify in open Court." Well, that didn't happen in the Sandra Craig case. "Was sworn and responded to a number of questions designed to determine her competence as a witness." Again, in open Court. That didn't happen in the Sandra Craig case. "During the course of the questioning, she became upset and seemed unable to answer further." Well, with the exception of a witness who wasn't permitted to testify in this case, that didn't happen in the Sandra Craig case either. "Although she indicated she "could answer the [S1-15] questions if we went into another room with the camera." And so, by being questioned in open Court by Judge Heller, this particular answer to his question was given. The Court used this as its basis for not saying that the Court didn't question the child in this case. Now, we don't have anything like that in this record. None at all. We have four children, who were all kept from coming into open Court in January, when this hearing took place. Contrary to the Rule of Wildermuth and McKoy. These four children had (inaudible

word) in Court. There were two experts in Wildermuth. There was only one expert as to Brooke Etze. There was only one expert as to Justin Peeples. One expert as to Jessie Sue Smith. And one expert as to Drew Woodbury. What the expert said on page thirty-seven to thirty-eight of the transcript shows the inadequacy of the foundation laid by that expert. She said in response to question, "On the basis of your training and expertise in contact with Brook Etze, can you tell the Court what that opinion is?" And this was about her ability to comment [sic] to a courtroom during the course of these trials and testify face-to-face with Ms. Craig. "My opinion is that it would very difficult if not impossible for Brooke to sit in the same room with Ms. Craig, and discuss the alleged abuse incidents. I believe it would also be difficult for her, because of [S1-16] her age to sit in front of a room of strangers, whether they be Ms. Craig or any others, and discuss the allegations. A second factor would be, she perceives herself as being threatened. She truly believes those threats would be carried out against her." Now, bear in mind, Judge, that at the time that Fred Kolodner was questioning this expert, he had not obtained any of the vital records in this case, which would have shown several things. It would have shown on numerous, previous occasions, Brooke Etze was able to talk about this to her mother, to her father, to her therapist, and to Kate O'Donnell. It would also show that on numerous, previous occasions, Kate O'Donnell was present during the therapy sessions to prepare this child for testimony in open Court. And Fred Kolodner did not request that the child be brought to open Court, like we did, and to be questioned by the Court, like we did. The reason he didn't request that was because he evidently didn't check, like we did, the Court of Appeals pending docket, with the realization that this case was being decided, and might affect the outcome of this litigation. And that there was a record that had to be protected. And so, we did that. We raised all of those issues because we felt

we had the duty to do that. Mr. Kolodner didn't do that. He evidently didn't feel he had the duty to do it. Consequently, Mr. Warfield exploits that breach of [S1-17] duty, and saids there was a waiver. Well, we have a Motion for New Trial that you ruled on, on the grounds of incompetency of counsel. And one of the things that we were going to raise, had we been permitted to complete our presentation, was this very failure by Mr. Kolodner, to do what we believe a reasonable, prudent, and competent criminal defense lawyer would have done. And Mr. Warfield can't say that it was not prejudicial to raise it, while at the same time, he saids that his failure to raise it, it fails, it prevents this Court from considering the issue. While I'm on that same topic of waiver. A waiver is an affirmative act by a lawyer. You have to know you're giving up a defendant's right, and you have to go ahead and give it up. And the only excuse for doing that is if there's some kind of viable trial tactic that you are persuing. Obviously, there could be no trial tactic in this case. The Court of Appeals, the Court of Special Appeals has been very clear about a lawyer's failure to raise a legal issue, which if raised, would have put his client in the ballpark. And that is, that it's incompetency of counsel, absent a viable trial tactic. On the basis of ignorance of law. So we're on firm ground on that. We could raise that same question as to each of the remaining three children because Mr. Kolodner failed to do what he was suppose to do as to each of them. And again, we [S1-18] can visit that failure of getting those records at his doorstep. We got them. We did what we're suppose to do. Q. E. D. Now, I think what the State is trying to get you to do on this waiver question, Judge, is to not deal with the issue at all. On the ground that it wasn't dealt with earlier. But then out of the same breath, the State saids, well, putting that aside, even though you didn't make a factual finding earlier, we want you to make one now. So don't deal with the issue because Fred Kolodner didn't deal with it, but

deal with the factual question even though you didn't deal with it back then. I think there's an inherent contradiction there that's obvious. There's an additional reason why the Court ought to deal with this question today. I think if we're honest with ourselves, putting aside advocacy for a moment, and just dealing with the fundamental truth of the question. Unless you've read the briefs, as we did, and know what the issues were, as we did, it would have been shocking that the Court would have read into the statute, the requirement, it would have been surprising that the Court would have read, strike shocking, into the statute the requirement that the Court must question the child. Because it doesn't appear on the face of the statute. And what the Court did in this case was very significant, and it said, that the right of confrontation does include the right of the [S1-19] witness to look at the defendant. The defendant's right to have that done. Because the Court believed that, and it went on in great length to say this, the defendant's right to have the witness be forced to look at her has a salutory affect on the truth-finding process because it's common knowledge that many people are influenced to tell the truth when they are confronted with the temptation of telling a lie in the presence of the person against whom they would lie. And so, it is clear from McKoy and from Wildermuth, that Ms. Craig lost her right under the confrontation clause as it's interpreted by the Maryland Court of Appeals, to have that part of the confrontation. And so the Court said, that in order to take that part of the right away, there has to be a very high threshhold that this Court must cross in order to make up for what is lost. And that threshhold includes, as a rule, that the Court must question the child face-to-face on the relevant issues involved. Not on competency. Not on the facts of the case. But on the issues and the statute, the child's ability to communicate in open Court as opposed to chambers. Very simple question could have been asked. Brooke, have you been in the courtroom? You think you

could talk to us out there? And Brooke would have been able to say yes or no. While I'm on the subject of Brooke, we have a video tape. And that video tape [S1-20] shows that Brooke Etze didn't have any kind of difficulty communicating about anything. The State told the jury, and the bragged later on, how intelligent, how straightforward, how poised this young lady had been, to boister [sic] our credibility. Can we infer from that that she wouldn't have been that way in open Court? Can the State infer from that that this is a young lady who would have had a problem testifying? And when you read the record, Judge, you see the record is almost identical to the one in Wildermuth. It's the same inadequacy in the record concerning the foundation. And as to the other kids, if you look at page thirty-nine to forty, as to Justin Peeples, you'll see an even greater inadequacy in the record in this case.

> "Question: Alright. What is that opinion again, based on your training and expertise in your contact with the young man involved, Justine Peeples?"
>
> "Answer: For Justin, I believe that Justin would be, once again, he would have great difficulty talking in front of people, particularly in front of Mrs. Craig, whom he sees as a threatening figure."

That just doesn't meet the statutory requirement. And I'm sure that Mr. Warfield and I both have great difficulty talking in front of a jury. I'm sure that we all have great difficulty standing up and giving our first speech. [S1-21] Great difficulty's not the test. Now, as to the second problem.

> "Question: Alright. Can you relate that to the emotional distress and the ability to reasonably communicate?"
>
> "Answer: Yeah. I think it would be very, it would impair his ability to communicate. My feeling is that if the goal would be to allow this child to be heard

to maximize that opportunity, and provided with privacy in his disclosure, and to remove the threatening agent, which he perceives as Mrs. Craig."

Period, that's it. Now that same page we got Jessie Sue Smith. Again, an inadequate record. As to Jessie Sue Smith, how much time did you spend with her? Then after going into that, she gives the foundation opinion on page forty-two.

"Question: And do you have, based on the time spent with her, with Jessie Sue Smith, in your expertise, do you have an opinion as to her ability to testify in either of those cases, in Court, regarding those allegations?"

"Answer: Yes."

"Question: Okay, and again based on your expertise and your contact with Jessie Sue Smith as to Ms. Craig, can you tell the Court what that opinion [S1-22] is?"

Let's stop there for a moment, Judge. This is an expert witness who has a particular specialty as a child counseling specialty. I guess the closest relationship it has to any other specialties, based on the testimony in this case, is psychiatry and psychology. These witnesses were never asked to give their opinion to a reasonable psychological certainty. As is required by every Maryland case that's ever dealt with expert testimony. True, they're not doctors. They're not psychologists. But they're not lay people either. They have a field. Their training is psychology. You heard me bring it out from Mary Burke, during one of the Motions. And I moved to incorporate that testimony into this record, and that is, that Mary Burke gained all of her experience in this area from courses in psychology and courses in psychiatry different in no way from those that doctors and psychologists take. And she based her opinion on that, and on her interaction with the child, and

her experience as a therapist. So here's what the opinion was.

"Question: Can you tell us what, the Court what the opinion is?"

"Answer: As to Ms. Craig, she perceives herself again, as her life has been threatened. Her family, her parents, and her siblings have been threatened. [S1-23] She believes that Ms. Craig is capable and willing to carry out those threats at home, and Jessie is fearful of this person. I believe that that fear would impair, preventing her to sit in front of person, or to be in the same room with that person, would be unable to discuss or to share with the required individuals that information, which she has to share regarding these allegations."

"Question: How does that relate to emotional distress?"

"Answer: Well, Jessie's been in therapy for over a year, at this point, trying to deal with the issues that have been surfaced regarding the stress and destruction in her life, emotionally. I think that that would be a step back for Jessie, to have to face this person. I think that her fear, again, that her life may be jeopardized, or that of her family. When I discuss it by talking to her, you can see it would cause her not to share that information."

Again, woefully inadequate. And I'll spare the Court the reading of the Drew Woodbury part. It's just as bad. It's just as inadequate. And so, because the Court did not require, or because rather, the State did not ask the relevant questions. Did not get full and complete answers, for the reasons that I've just indicated, the State hasn't [S1-24] met its burden. Now the State mentioned that Christian gives the Court the right to make a post-trial finding in this kind of situation. Well, in the Christian

case, it was a post-trial finding that it had inappropriately followed the law. And so, what the Court did in Christian was simply reverse a legal judgment that it had made on the bona fides of a Motion for New Trial. Christian did not involve a post-trial factual finding. And, indeed Judge, if you want to incorporate some of the things that the State was saying that you ought to take into account, an evidentiary hearing would be required, and we would have the right to put on evidence to counter both the interpretation in the thrust of what the State said to clarify the misconstruction of what the State said. For example, this business about Brooke Etze doubling over when she was confronted with Sandra Craig is not what happened at all. And if you will recall what those records said, those records were basically contradictory. And, Brooke Etze misidentified someone as being Jamal Craig, according to my recollection of what happened, and not as Sandra Craig as the State suggests. And so, before you take into account any records, you have to have the benefit of testimony and argument on those records, if you're going to make a post-trial finding. Now, therefore the Christian case is not appropriate. This business [S1-25] about breathing disorders and all of that stuff. Judge, for the Court to make a post-trial finding, in the absence of both sides having an opportunity to have input into that finding by questioning the witness, by being able to call Brooke Etze to the witness stand, or by being able to question these therapists who were called, with reference to both what Brooke Etze saids on the stand, and with reference to the records that were withheld by the State, is a necessary prerequisite to making any post-trial finding. This Court hasn't permitted us to do that. The Court, indeed, has spoken as to the length of the Motion for New Trial, and the evidence that could be permitted. Of course, I would at this time, request that the Court permit us to call Brooke Etze, Justin Peeples, Jessie Sue Smith, and Kevin McDonough, so that we can, and Drew Woodbury rather, so

that we can have the opportunity to persuade the Court that they could get up and lucidly present their side of the story. Now finally, all that sine qua non means, and I don't know why we don't just reject all this——

THE COURT: It means a prerequisite, doesn't it?

MR. MURPHY: A necessary element, an essential agreement, that's all it means. I mean we try to get fancy because I guess we have to justify all the tremendous expense of our training and whatnot, and you know [S1-26] what the revolutionaries always say, the first people who ought to be killed are lawyers, and so I think we have to distance ourselves from the general public wheel by using magic words, instead of simple expressions. But it means what the Court saids it means. And, there's no escaping what the rule is, and what the Wildermuth case said. Wildermuth said, that simply calling an expert, without more, isn't enough. That's what you have. And so the Rule ought to be applied in this case. And, by the way, if the Court of Appeals had meant for the Court to make post-trial findings, it would have remanded Wildermuth with the express direction, as it is often done in other cases, to Judge Williams, to make post-trial findings in this case. I think whatever the record is, Judge, is the record. We're stuck with it. That's it. Under the terms of Wildermuth. So I would ask this Court to say that is the Rule. To say that the Rule wasn't followed in this case. To say that all you had on the issue when you moved, and all you're permitted to say about it now, is what the so-called experts say. To say that the expert testimony was inadequate on the two grounds, basically, the failure to say, to a reasonable psychological or psychiatric certainty, or whatever the appropriate standard was. And the failure to be any more certain in terms of the facts than they were, in terms of their opinion, and the failure to elicit [S1-27] enough facts from those experts, and therefore, grant Sandra Craig a new trial. Thank you.

THE COURT: Counsel, clearly the, no objection was made at the trial by the defendant to the Court's failure to interview the children. But even assuming that the issue is before this Court on all fours, that is, the effect of this Court's failure to interview the children before it determined to permit closed-circuit t. v. I've read the Wildermuth case, and I read it several times. I also looked up sine qua non because I thought it meant prerequisite, and apparently it does mean prerequisite. Wildermuth clearly does not say that the trial court must interview the child before deciding to permit closed-circuit t.v. I mean, I think we all, that's my reading of Wildermuth. Just so the record's straight, this Court was aware that there was a pending case involving closed-circuit t.v. that originated from Anne Arundel County before the Court of Appeals, or I think it originally went to the Court of Special Appeals, perhaps the Court of Appeals granted it directly. I don't recall how it got to the Court of, I know the Court of Appeals, Special Appeals did not decide Wildermuth. And clearly, I think counsel were aware, counsel who participated in this trial were aware of the Anne Arundel case being on appeal. And, you know, the Court has to be intellectually honest, there's [S1-28] no way it could have envisioned that the Court of Appeals in interpreting Section nine dash one oh two would, at some future time, state that ordinarily the trial judge, and this is a quote, "ordinarily the trial judge should observe and question the child". But, quite frankly, with the benefit of hindsight, nothing that I've become award of during the course of this trial, leads me to conclude that my decision to permit closed-circuit t.v. was inappropriate. I'm convinced that the record was such that it warranted this Court in taking the action that it did. Wildermuth does not require personal observations by the trial judge as a prerequisite to the use of closed-circuit t.v. Wildermuth saids, what, that there is a prerequisite. But it tells us that the prerequisite is that the trial judge determine that the child, that the

victim's testimony in a courtroom will result in the child suffering serious emotional distress, such that the child cannot reasonable communicate. The prerequisite setforth in Wildermuth is the legislative deter-, is the legislative prerequisite. The necessary predicate setforth in the statute. This Court made a determination. Quite frankly, this Court that its determination to permit closed-circuit t. v. was appropriate. If I'm in error, I'll be told I'm in error. But I'm convinced, based upon the record before the Court, that it was appropriate [S1-29] under, under the evidence presented to permit the State as it did, pursuant to Section nine dash one oh two. I don't find that this Court's failure to interview the children on that limited issue, prior to making it's determination, to permit closed-circuit t. v. is error. Because I don't find that the Court was required to do so. So, for those reasons, I'll deny the defendant's Motion for a New Trial. Or amended Motion for a New trial. Now, as to disposition, the record should reflect, gentlemen, or counsel, pardon me, that you have obtained a copy of the presentence that was order some time ago.

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